(16,561.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 355.

THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW WHATCOM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Superior Court of the State of Washington in and for Whatcom County.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA *Columbia* RAILROAD COMPANY, Defendants. } 4667. Summons.

The State of Washington to the said Bellingham Bay and British Columbia Railroad Company, defendant:

You are hereby summoned to appear within twenty (20) days (or if served outside of the State of Washington, then within sixty (60) days) after the service of this summons, exclusive of the day of service, answer the complaint, and serve a copy of your answer on the persons whose names are subscribed to this summons, at the place specified following their names, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, a copy of which is herewith served upon you.

T. E. CADE,
D. W. FREEMAN,
Attorneys for Plaintiff.

P. O. address: New Whatcom, Whatcom county, Washington.

Indorsed: Filed Ap'l 14, 1896. C. A. Paureia, clerk, by Geo. A. Fisher, deputy clerk.

2 STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, J. J. Bell, sheriff of Whatcom county, State of Washington, do hereby certify that I received the annexed summons on the 27th day of March, 1896, and personally served the same on the 2nd day of April, 1896, on The Bellingham Bay and British Columbia Railroad Company, it being a defendant named in said summons, by delivering to and leaving with C. L. Anderson, the superintendent and agent of said railroad Co., personally, in said Whatcom county, a copy of said summons, and therewith a copy of the complaint in the action named in said summons.

Dated this the 2nd day of April, 1896.

J. J. BELL, *Sheriff,*
By H. T. SCHROEDER, *Deputy.*

Sheriff's Fees.

Service ..... 60c.
Travel ..... 20c.

3 In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendants.
} 4667. Complaint.

The plaintiff above named complains of the defendant and for a cause of action states:

1st. That the plaintiff herein is a municipal corporation or city of the third class, organized and existing under and by virtue of the laws of the State of Washington.

2nd. That the defendant, at all times hereinafter mentioned *were* and still is a corporation organized under and by virtue of the laws of the State of California, and *were* and *are* the owners of the real estate hereinafter mentioned.

3rd. That on, to wit, the 16th day of February, 1891, the plaintiff became the lawful successor of the former cities of Whatcom and New Whatcom, which were municipal corporations organized under the laws of the Territory and State of Washington respectively, said successorship being by virtue of the consolidation of said former cities of Whatcom and New Whatcom into one municipal corporation by the name of the "city of New Whatcom," which consolidation was consummated under and in conformity with the general laws of the State of Washington, the said former city of Whatcom having been incorporated by virtue of an act of the legislature of the Territory of Washington entitled "An act to incorporate the city of Whatcom," approved Nov. 24th, 1883, and said former city of New Whatcom having been incorporated under and in conformity with the general laws of the State of Washington.

4th. That the said former city of New Whatcom did on the 19th day of July, 1890, order that so much of Elk street, in the city of New Whatcom, Washington, as lies between its intersection with Elk street east, in said city, and the northerly line of North street be graded and leveled to the official grade of said portion of Elk street, and that said portion of Elk street be planked for ten feet on each side of the center line of said street on the entire length thereof, and that a continuous line of sidewalk nine feet wide be constructed on both sides of said portion of said street, and that the expense thereof be assessed upon the lots and lands fronting on that portion of said street so improved in proportion to the benefits to the same.

4 5th. That thereafter the said former city of New Whatcom let to the lowest responsible bidder the contract to grade and improve said portion of said street, as aforesaid, and that thereafter said portion of said street was so improved under said contract at a cost of $12,968.80, and the said work and improvement was duly accepted by the said former city of New Whatcom, and warrants of said city were issued in payment therefor.

6th. That said former city of New Whatcom did thereafter levy

an assessment upon the lots and tracts of land fronting and abutting on said portion of said street so improved for the purpose of paying the cost of said improvement (after deducting the payments made by the city for improvements at the corners and intersections of streets); that said assessment was not made in accordance with the laws governing said city, and that its enforcement has been refused by the court of this State.

7th. That the city council of the city of New Whatcom did on the 18th day of March, 1895, duly pass and adopt its ordinance No. 301, entitled "An ordinance providing the method of making, levying, and collecting assessments for local improvements in the city of New Whatcom, Washington, by a new assessment or reassessment of the cost and expense of making the same upon the property benefited thereby."

8th. That the city council of The City of New Whatcom, the plaintiff herein, did on the 10th day of June, 1895, duly pass and adopt its ordinance No. 306, entitled "An ordinance ordering and providing for a new assessment or reassessment upon the blocks, lots, and parcels of land which have been or will be benefited by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington, and designating and establishing local improvement district No. 8 *b*," which said ordinance was duly approved June 11th, 1895, and published June 18th, 1895.

9th. That the following-described property, to wit, "all of the right of way of the Bellingham Bay and British Columbia Railroad Co., situated in the west half of block 255 and in block 254, First addition to New Whatcom," is situate in the city of New Whatcom, in Whatcom county, Washington, and is situate and included within the limits of said local improvement district No. 8 "*b*" as defined in said ordinance No. 306.

10th. That between the 18th day of June, 1895, and the 22nd day of July, 1895, the above-described premises were duly and separately assessed and set down upon a special assessment-roll under and by virtue of the aforesaid ordinances; that said roll was duly submitted to the city council of the city of New Whatcom, who after due and legal notice of the time and place of such meeting did at a regular session of said body hear and consider any and all objections touching the regularity of the proceedings in making said assessment or reassessment and the amount to be assessed and levied upon any block, lot, or tract of land for said improvement, and duly and separately assessed, at the time and place and in the manner aforesaid and as provided by law, the said premises as follows, to wit: Upon said piece of land described as follows, to wit, "all of the right of way of the Bellingham Bay and British Columbia Railroad Co. situated in the west half of block 255, First addition to New Whatcom," there was duly and separately assessed and levied $221 as the amount of benefits derived or received by said tract of land from said improvement.

5 11th. That upon the said premises there was duly and separately levied and assessed, under and in pursuance of said

ordinances No. 301 and 306, for the purpose of paying the cost of said improvement—grading, leveling, planking, sidewalking, and other improvement-, as aforesaid—the sum of money so assessed and mentioned in paragraph 10 herein, amounting to $221.00.

12th. That the said City of New Whatcom, the plaintiff herein, did on the 5th day of August, 1895, duly pass and adopt its ordinance No. 310, entitled "An ordinance approving and confirming the proceedings in making the assessment or reassessment and the assessment or reassessment upon blocks, lots, and parcels of land which have been or will be benefited by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington," which said ordinance was duly approved August 7th, 1895, and published August 10th, 1895.

13th. That on the 23rd day of September, 1895, said tax and assessment of $221.00 was unpaid and became delinquent, and the same, with interest thereon from said twenty-third day of September, 1895, and the costs of collection thereof, became and still is a lien upon said premises.

14th. That the said defendant- have or claim to have some interest in and to said premises or some part thereof, but plaintiff avers that their said claim or interest, if any they have, is subsequent and inferior to the lien of the plaintiff herein.

6 16th. That no part of said sum so assessed and levied upon the said property as aforesaid has been paid, and that there is now due and owing plaintiff upon said assessment and for said improvement as aforesaid the sum of $221.00 and the interest thereon from the 23rd day of September, 1895, and that the defendant- refused and still refuse to pay the same or any part thereof.

Wherefore plaintiff prays judgment:

1.

That the claim of the plaintiff herein, in the sum of $221.00 and the interest thereon from and after September 23rd, 1895, and the costs of this action, be declared to be a lien upon the above-described premises prior and superior to the rights and claims of the defendants therein.

2.

That the said lien be foreclosed, and that said premises be sold by the sheriff of Whatcom county pursuant to the statutes in such cases made and provided and the rules and practice of this honorable court, and that the proceeds be applied to the payments of amount due plaintiff.

3.

That the said defendant- and all persons claiming or to claim said premises by, through, or under them or either of them be forever barred and foreclosed of and from all right, title, and interest in and to said premises or any part thereof save and except the equity of redemption, as provided by law.

4.

That the plaintiff have such other and further relief as to the court seems meet and equitable in the premises.

T. E. CADE,
D. W. FREEMAN,
Attorneys for Plaintiff.

Indorsed: Filed Ap'l 14, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

7 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, D. W. Freeman, being first duly sworn, on oath say that I am the duly elected, qualified, and acting "city attorney" of The City of New Whatcom, the plaintiff herein, and as such make this verification; that I have read the foregoing complaint, know its contents, and believe the same to be true.

D. W. FREEMAN.

Subscribed and sworn to before this 24th day of M'ch, 1896.

P. F. WHITING,
Notary Public, State of Washington,
Residing at New Whatcom, in said State.

Indorsed: Filed Ap'l 14, 1896. C. A. Puareia, clerk, by Geo. C. Fisher, deputy clerk.

8 In the Superior Court of Whatcom County, State of Washington.

CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant.

No. 4667. Demurrer of the Defendant, The Bellingham Bay and British Columbia Railroad Company.

The defendant, The Bellingham Bay and British Columbia Railroad Company, demurs to the complaint of the plaintiff herein upon the grounds and for the reasons as appear affirmatively upon the face thereof; that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore this defendant asks to be hence dismissed, and to have judgment against the plaintiff for its costs in this behalf expended.

DORR, HADLEY AND HADLEY,
Attorneys for Defendant.

Indorsed: Filed Ap'l 22, 1896. C. A. Puariea, clerk.

9 In the Superior Court of the State of Washington for Whatcom County.

At a regular session of the above-entitled court, sitting on May 18th, 1896, among other things, the following was had and done, to wit (vol. 1, Minute Book, page 139):

CITY OF NEW WHATCOM, Plaintiff,
vs.
B. B. AND B. C. R. R. Co., Defendant. } No. 4667.

This cause coming on regularly for hearing of defendant's demurrer herein and the court being fully advised in the premises, hereby overrules said demurrer and allows defendant ten days from this 18th day of May, A. D. 1896, in which to answer herein; to which ruling of the court defendant asks and is allowed an exception.

10 In the Superior Court of Whatcom County, State of Washington.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667. Answer.

Comes now the defendant, The Bellingham Bay and British Columbia Railroad Company, and, answering the complaint of the plaintiff herein, answers and says:

I.

It admits the allegations contained in paragraph I, II, III, and IX of said complaint.

II.

It denies the allegations in each and all thereof and each and every part thereof contained in paragraphs IV, V, VI, VII, VIII, X, XI, XII, and XIII.

III.

Answering the allegations contained in paragraph XIV, defendant admits that no part of the sum claimed as an assessment has been paid, but denies that said sum or any other sum or any interest is due from defendant for the said alleged assessment.

First Defense.

And for a first affirmative defense herein the defendant avers that this action was not commenced within the time limited by law.

11 *Second Defense.*

And for a second and further affirmative defense said defendant alleges that the property described in said complaint, upon which said assessment is sought to be established and recovered and upon which said lien is attempted to be created by this proceeding, is a part and small section of the right of way of a railroad now and at all times in said complaint mentioned in actual use and operation as a common carrier, having constructed thereon and across said

described land a railroad track over and upon which trains of cars are actually run daily and have been so run at all times in said complaint mentioned, and that said trains so run and operated over and upon said described land carry passengers, freight, and the United States mail daily between terminal points, one of which is on Bellingham bay, and the other at the international boundary line between the United States and British Columbia, and defendant avers that no part of said property is liable for said assessment or any part thereof, and that it is against the law and against public policy to foreclose a lien upon a section or part of a railroad right of way.

Wherefore defendant asks that it may go hence without day, and that plaintiff's action may be dismissed, and that defendant may have judgment against plaintiff for its costs and disbursements in this behalf expended.

DORR, HADLEY AND HADLEY,
Attorneys for Defendant.

12 STATE OF WASHINGTON, } ss:
County of Whatcom, }

C. L. Anderson, of said county and State, being first duly sworn, upon oath deposes and says that he is the general manager and agent of the defendant in the above-entitled action; that he has read the above and foregoing answer and knows the contents thereof; that the allegations and statements therein contained are true, as he verily believes.

C. L. ANDERSON.

Subscribed and sworn to before me this 28th day of May, A. D. 1896.

D. DAUN EGAN,
[SEAL.] *Notary Public in and for the State of Washington, Residing at New Whatcom, in said State.*

Indorsed: Filed May 28, 1896. C. A. Puarica, clerk.

13 In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE B. B. AND B. C. R. R. Co., Defendant. } 4667. Motion.

Comes now the above-named plaintiff and moves the court to strike from the answer of the defendant herein all that portion thereof designated "a second and further affirmative defense," for the reason that the same is sham, frivolous, and no defense to this action.

T. E. CADE,
D. W. FREEMAN,
KERR AND McCORD,
Attorneys for Pl'ff.

Service accepted.
May 29th, 1896.

DORR, HADLEY AND HADLEY,
Attorneys for Def't.

Indorsed: Filed May 29, '96. C. A. Puariea, clerk, by George C. Fisher, deputy clerk.

14 In the Superior Court for the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Amended Answer.

Comes now the above-named defendant and, leave of the court first being had, files this its amended answer to the complaint of the plaintiff herein and alleges as follows:

First answer.

For its first answer and defense the defendant alleges:

1st. Answering the allegations contained in paragraphs one, two, three, and nine of said complaint, the defendant admits the same and each and every part thereof.

2nd. Answering paragraphs four, five, six, seven, eight, ten, eleven, twelve, and thirteen of said complaint, the defendant denies the same and each and every allegation therein contained.

3rd. Answering the fourteenth paragraph of said complaint, the defendant admits that it claims some interest in and to the premises described in said complaint as owner, but denies that said claim or interest is subsequent and inferior to the alleged lien of the plaintiff thereon.

15 4th. Answering the sixteenth paragraph of said complaint, the defendant admits that no part of the sum assessed or levied upon the property described in said complaint as therein stated has been paid, but denies that there is now due and owing the plaintiff upon said assessment set out in said complaint any sum, either as principal or interest, on account of said assessment.

Wherefore the defendant prays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disbursements, and for such other relief, both general and special, as to the court may seem equitable.

Second answer.

For a second and separate answer to said complaint, and as new matter constituting an affirmative defense to the alleged causes of action therein set forth, the defendant represents and alleges:

1st. The defendant reaffirms and re-avers each and every allega-

tion contained in its first answer and defense above set forth, and incorporates the same as a part hereof as fully and completely as though herein expressly stated.

2nd. That the alleged cause of action stated in said complaint has not been commenced within the time limited by law, and that said alleged cause of action is barred by the statute of limitations of the State of Washington.

Wherefore the defendant pays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disbursements, and such other relief, both general and special, as to the court may seem equitable.

Third answer.

For a third and separate answer to said complaint, and as new matter constituting an affirmative defense to the alleged cause
16 of action therein set forth, the defendant represents and alleges:

1st. The defendant reaffirms and re-avers each and every of the allegations contained in its first answer and defense set forth, and incorporates the same as a part hereof as fully and completely as though the same were herein expressly stated.

2nd. That the lavy and assessment mentioned in paragraph six of said complaint was levied on said lands described in the plaintiff's said complaint upon the sixth day of November, A. D. 1890, and that the same became due and payable upon said day, and no action or actions was or were ever instituted by plaintiff or any person whomsoever for the foreclosure and collection of said levy and assessment against said lands described in plaintiff's said complaint or any portion thereof, and that plaintiff's alleged cause of action is barred by the statute of limitations.

3rd. That said levy and assessment mentioned in paragraph six of said complaint was levied and payable prior and before the first day of April, A. D. 1891; that none of said described real estate was ever sold for said levy and assessment prior to the first day of November, A. D. 1892, or was ever at any time sold for such levy and assessment, and that said levy and assessment ceased to be a lien upon said lands and the whole thereof on the first day of November, A. D. 1892.

Wherefore the defendant prays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disbursements, and for such other relief, both general and special, as to the court may seem equitable.

Fourth answer.

And for a fourth and separate answer to said complaint, and as a new matter constituting an affirmative defense to the alleged causes of action therein set forth, the defendant represents and alleges:

17 1st. The defendant reaffirms and re-avers each and every allegation contained in its first answer and defense above set

forth and incorporates the same as a part hereof as fully and completely as though herein expressly stated.

2nd. That the amounts levied and assessed against said lands described in said complaint by the said pretended reassessment was assessed against said lands in proportion to the number of feet of said lands fronting or abutting on said alleged improvement, or in proportion to the number of feet frontage said lands have along the improvement where the same do not front or abut thereon (none of said lands contained in block No. 255 of said First addition to New Whatcom, in fact, front or abut on said improvement), and not in proportion to the benefits derived or received by or conferred upon said lands by said improvement; and that said assessment against said lands specified in plaintiff's said complaint were in truth and in fact not the amounts properly assessable against said lands according to the benefits derived or accruing thereto; and that said assessment was arbitrary and not upon the basis of the benefit or benefits derived or accruing to such lands or any of them.

Wherefore the defendant prays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disbursements, and for such other relief, both general and special, as to the court may seem equitable.

Fifth answer.

And for a fifth and separate answer to said complaint, and as new matter constituting an affirmative defense to the alleged causes of action therein set forth, the defendant represents and alleges:

1st. Defendant reaffirms and re-avers each and every allegation contained in its first answer and defense above set forth, and incorporates the same as a part hereof as fully and completely as though herein expressly stated.

2nd. That said improvement district for which said alleged improvement was reassessed is other and different from that
18 previously assessed as specified in paragraph six of said complaint, and from that provided by the law in force at the time of said prior assessment mentioned in said paragraph six of said complaint; that none of the lands lying in block No. 255 of the First addition to New Whatcom, referred to in the plaintiff's said complaint, front or abut upon said improvement or upon the street whereupon said improvement was constructed; that all of said lands are improperly and illegally included in said reassessment, and that by reason of the change in said improvement district and the reassessment attempted to be made thereunder the defendant is impaired in the rights secured to it under the constitution of the State of Washington, and especially under article 1, sections 3 and 16, of the constitution of the State of Washington and of the Constitution of the United States, and especially amendments 5 and 14 of the Constitution of the United States, and that said reassessment is void.

Wherefore the defendant prays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disburse-

ments, and for such other relief, both general and special, as to the court may seem equitable.

Sixth answer.

And for a sixth and separate answer to said complaint, and as new matter constituting an affirmative defense to the alleged causes of action therein set forth, the defendant represents and alleges:

1st. Defendant reaffirms and re-avers each and every allegation contained in its first answer and defense above set forth and incorporates the same as a part hereof as fully and completely as though herein expressly stated.

2nd. That at all times in said complaint mentioned and since the year 1889 and prior thereto the defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and both prior and since said time defendant has been and is authorized to transact business in the State of Washington, and that during said time defendant's principal office
19 and place of business, together with the residence of its managing officers, has been and now is within the limits of the present City of New Whatcom, the plaintiff herein, and its predecessors, the cities of New Whatcom and Sehome, the territories of which last-named cities were, about February 16th, 1891, by consolidation with the city of Whatcom, embraced and included within the limits of the present City of New Whatcom, the plaintiff herein.

3rd. That the defendant and none of its officers and agents were ever served with or in any manner given personal notice or any notice whatever of any of the proceedings had or taken by the plaintiff city in the matter of said alleged reassessment or of any of the matters set out in the plaintiff's said complaint, and was never at any time given personal notice or any notice of the alleged meeting, or of the time and place thereof, held by any council of plaintiff city, as alleged in paragraph ten of said complaint, except as in the next paragraph hereof set forth.

4th. That the only notice of any kind or nature ever given by plaintiff city of any of the matters or proceedings alleged in plaintiff's said complaint relative to said pretended reassessment was and is an alleged notice printed in the issues of the Daily Reveille, the official paper of said city plaintiff, issued July 9th and 10th and 11th, in the year 1895, respectively; which said notice is in words and figures as follows, to wit:

Notice.

Special levy of the expense of local improvement district No. "8 *b*," on Elk street, from its intersection with Elk street east to North street.

Notice is hereby given to all owners of property in the above-described local improvement district and to all other persons
20 whom it may concern that the assessment or reassessment roll providing for the levy of the expense of grading and

leveling said portion of Elk street above described to the official grade thereof, of planking said portion of Elk street above described for ten (10) feet on each side of the center line thereof, and of constructing a continuous line of sidewalk nine (9) feet wide upon both sides of said portion of said St. above described, was filed in the office of the city clerk on the 8th day of July, 1895, and that the same is now open to inspection; that on Monday, the 22nd day of July, 1895, at 7.30 p. m., at the city council rooms, in the building known as the "city hall," in the city of New Whatcom, the city council will meet and hear, consider, and determine any and all objections which have been filed to the regularity of the proceedings in making such assessment or reassessment and to the amount to be assessed and levied upon each block, lot, or tract of land for said improvement.

Dated at New Whatcom, Wash., July 9th, 1895.

J. K. APPLEBY, *City Clerk.*

5th. That said notice is not such notice as is required by said statute and is vague and uncertain, and is neither addressed to the defendant or to any property-owner by name, nor does the same contain any property description whatever, and especially fails to describe any of the property mentioned in the plaintiff's said complaint.

6th. That said printed notice or any printed notice or any notice whatsoever, other than actual personal notice to defendant, is insufficient, illegal, and of no effect.

21 7th. That the defendant never petitioned for nor consented to said improvement, and never appeared before the council of the plaintiff city relative to said alleged reassessment, and never filed with the city clerk thereof any objection in writing thereto.

8th. That said reassessment act provides, among other things, that upon giving the notice by publication therein provided, the council of plaintiff city may at the meeting designated in such notice, among other things, "pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity, and correctness of said reassessment to the amount thereof levied on each lot or parcel of lands."

9th. That no provision is contained in said reassessment act or in any of the alleged ordinances mentioned in said complaint providing a mode or manner of ascertaining and awarding to defendants the amount of damage accruing to said lands mentioned in said complaint, and that said complaint fails to state facts sufficient to constitute a cause of action.

10th. That by reason of the premises and of said proceedings had by plaintiff and set out in its said complaint defendant is impaired in the rights secured by it under the constitution of the State of Washington, and especially under article 1, sections 3 and 16 thereof, and of the Constitution of the United States, and especially amendments 5 and 14 thereof.

Wherefore the defendant prays to be hence dismissed, and that it

may have judgment against the plaintiff for its costs and disbursements, and for such other relief, both general and special, as to the court may seem equitable.

Seventh answer.

For a seventh and separate answer to said complaint, and as new matter constituting an affirmative defense to the alleged causes of action therein set forth, the defendant represents and alleges:

22 1st. The defendant reaffirms and re-avers each and every allegation contained in its first answer and defense above set forth and incorporates the same as a part hereof as fully and completely as though herein expressly stated.

2nd. That the property described in the said complaint, upon which the said assessment is sought to be established and recovered and upon which said lien is attempted to be created by this proceeding, is a part and small section of the right of way of a railroad now and at all times in said complaint mentioned owned by defendant and in actual use and operation as a common carrier, having constructed thereon and across said described land a railroad track over and upon which trains of cars are actually run daily and have been so run at all times in said complaint mentioned, and that said trains so run and operated over and upon said described land carry passengers, freight, and the United States mail daily between terminal points, one of which is on Bellingham bay, and the other at the international boundary line between the United States and British Columbia; and defendant avers that no part of said property is liable for said assessment or any part thereof, and that it is against the law and against public policy to foreclose a lien upon a section or part of a railroad right of way.

Wherefore the defendant prays to be hence dismissed, and that it may have judgment against the plaintiff for its costs and disbursements, and for such other relief, both general and special, as to the court may seem equitable.

NEWMAN AND HOWARD,
Attorneys for Defendant.

23 STATE OF WASHINGTON, } ss:
County of Whatcom, }

I, C. L. Anderson, being first duly sworn on oath state that I am the general manager and agent of the defendant in the above-entitled action; that I have heard read the foregoing amended answer, know the contents thereof, and believe the same to be true.

C. L. ANDERSON.

Subscribed and sworn to before me this 15th day of July, 1896.

C. W. HOWARD,
Notary Public in and for the State of Washington,
Residing at Fairhaven

Service of the within amended answer is hereby acknowledged

and admitted and copy thereof received this 15th day of July, A. D. 1896, at ——.

T. E. CADE,
Attorney for Plaintiff.

Endorsed: Filed this 17th day of July, A. D. 1896. C. A. Puariea, clerk.

24 In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE B. B. AND B. C. R. R CO., Defendant. } 4667. Motion.

Comes now the above-named plaintiff and moves the court to strike from the amended answer of the defendants herein paragraph one of the third answer on the ground and for the reason that the same is sham, frivolous, and no defense to said action.

Plaintiff moves to strike from said answer the second paragraph of said answer for the reason that the same is immaterial and no defense to said action.

Plaintiff moves the court to strike the third paragraph of the third answer for the reason that the same is sham, frivolous, and no defense to said action, and that the same matters and things are alleged in paragraph two of the second answer of said answer.

Plaintiff moves to strike paragraph one of the fourth answer of defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

Plaintiff moves to strike the second paragraph of the fourth answer in said defendant'- answer contained for the reason that the same is sham, frivolous, and no defense to said action; for the further reason that the mode of assessment cannot be inquired into by the court in this action.

Plaintiff moves to strike the first paragraph from the fifth answer of said defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

25 Plaintiff moves to strike the second paragraph of the fifth answer of said defendant's answer for the reason that the matters and things alleged therein are immaterial and no defense to said action.

Plaintiff moves to strike the sixth paragraph in the sixth answer of said defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

Plaintiff moves to strike the third paragraph of the sixth answer of said defendant's answer for the reason that the same is sham, frivolous, and no defense to said action. and for the further reason that the same is inconsistent with the matters and things alleged in paragraph four of the sixth answer in said defendant's answer.

Plaintiff moves to strike from said sixth answer of said defendant's answer the fifth paragraph thereof for the reason that the same

is immaterial and no defense to said action, and the further reason that the same is a conclusion of law.

Plaintiff moves to strike the sixth paragraph of the sixth answer of said defendant's answer for the reason that the same is immaterial and no defense to said action, and the further reason that it alleges simply and solely a conclusion of law.

Plaintiff moves to strike the seventh paragraph of said sixth answer of said defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

Plaintiff moves to strike the eighth paragraph of sixth answer of said defendant's answer for the reason that the same is sham, frivolous, and no defense to this action, and for the further reason that said paragraph merely quotes the statutes and does not plead any fact or facts.

Plaintiff moves to strike the ninth paragraph of the sixth answer of said defendant's answer for the reason that the same is irrelevant and immaterial and is no defense to said action, and especially moves to strike the last two lines of said paragraph, beginning at the word "and," for the reason that the balance of the said paragraph is a conclusion of law and can be raised only by a demurrer.

Plaintiff moves to strike the tenth paragraph of said sixth answer of defendant's answer for the reason that the same is a conclusion of law and pleads no fact or facts whatsoever.

Plaintiff moves to strike the first paragraph of said seventh answer of defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

Plaintiff moves to strike the second paragraph of said seventh answer of defendant's answer for the reason that the same is sham, frivolous, and no defense to said action.

____ ____,
Attorney for Plaintiff.

Indorsed: Filed July 17th, 1896. C. A. Puariea, clerk.

In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant.
} No. 4667. Order.

On this the seventeenth day of July, A. D. 1896, this cause coming on to be heard upon the motion of plaintiff filed herein, and upon the further oral motion of the plaintiff, made at the hearing herein, to strike from the separate answer of the defendant herein certain paragraphs therein—T. E. Cade and D. W. Freeman appearing for the plaintiff and Newman and Howard appearing for the defendant—after hearing argument of counsel thereon and being fully advised in the premises, — orders that plaintiff's motion to strike paragraphs one, two, and three of the third answer of the

defendant and paragraphs one and two of the seventh answer (being all of seventh answer) be, and the same is hereby, denied; to the denial of which plaintiff at the time asked and is allowed an exception.

It is further ordered by the court that the plaintiff's said motion to strike paragraph- one, two of the fourth answer, paragraph- one, two of the fifth answer, and paragraphs one, two, three, four, five, six, seven, eight, nine, and ten of the sixth answer (being all of the sixth answer) be, and the same — hereby, sustained and allowed, and said specified portions of said answers are hereby stricken from such answers; to the sustaining and allowance of which motion the defendant at the time asked and is allowed and exception.

Done in open court this the seventeenth day of July, A. D. 1896.

JNO. R. WINN,
Judge of said Court.

Indorsed: Filed this 24th day of July, 1896. C. A. Puariea, clerk.

28 In the Superior Court of the State of Washington in and for Whatcom County.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE B. B. AND B. C. R. R. COMPANY, Defendant. } 4667. Reply.

Comes now the above-named plaintiff and for reply to the allegations contained in the answer of the defendant herein denies and alleges as follows, to wit:

1.

Answering the allegations set forth in the second answer of said defendants, plaintiff denies the same and each and every part and the whole thereof, and expressly denies that said action is barred by the statute of limitations of the State of Washington.

2.

Replying to the third answer of said defendant, this plaintiff admits that said city attempted to levy an assessment as therein set forth, but avers that said assessment was declared void by the supreme court of this State. Plaintiff denies every other allegation in said answer.

Wherefore plaintiff prays judgment as in its complaint.

T. E. CADE,
D. W. FREEMAN,
KERR & McCORD,
Att'ys for Plaintiff.

29 STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, D. W. Freeman, being first duly sworn, on oath say that I am the duly elected, qualified, and acting "city attorney" of the city of New Whatcom, and as such make this verification; that I have

read the foregoing complaint and know its contents; that the material allegations therein are within my personal knowledge, and that I believe the same to be true.

D. W. FREEMAN.

Subscribed and sworn to before me this 17th day of July, 1896.

C. W. HOWARD,
Notary Public.

Indorsed: Filed July 17, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

30 In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD CO., Defendant.
} Findings. 4667.

This cause having come on regularly for trial the 17th day of July, 1896, upon the complaint, answer, and reply, the plaintiff appearing by its attorneys, T. E. Cade, D. W. Freeman, and Kerr and McCord; the defendant by Newman and Howard, its attorneys; and the court having heard all of the testimony in said cause and the argument of respective counsel, and having inspected the pleadings in said cause, and being now fully advised in the premises, it, the court, does make the following

Findings of Fact.

1. That the plaintiff is a municipal corporation or city of the third class, organized and existing under and by virtue of the laws of the State of Washington.

2. That the defendant, The Bellingham Bay and British Columbia Railroad Company, is a private corporation organized under the laws of the State of California, and authorized to do business in the State of Washington.

31 3. That on the 16th day of February, 1891, the plaintiff became the lawful successor of the former cities of Whatcom and New Whatcom, which were municipal corporations organized under the laws of the Territory and State of Washington respectively, said successorship being by virtue of the consolidation of the former cities of Whatcom and New Whatcom into one municipal corporation under the name of the "city of New Whatcom," which consolidation as consummated under and in conformity with the general laws of the State of Washington, said former city of Whatcom having been incorporated by virtue of an act of the legislature of the Territory of Washington entitled "An act to incorporate the city of Whatcom," passed November 23rd, 1883, and said former city of New Whatcom having been incorporated under and in conformity with the general laws of the State of Washington.

4. The said former city of New Whatcom did on the 19th day of July, 1890, order that so much of Elk street, in the city of New Whatcom, Washington, as lies between its intersection with Elk street east, in said city, and the northerly line of North street be graded and leveled to the official grade of said portion of said Elk street, and that said portion of Elk street be planked for ten feet on each side of the center line of said street on the entire length thereof, and that a continuous line of sidewalk nine feet wide be constructed on both sides of said portion of said street, and that the expense thereof be assessed upon the lots and lands fronting on said portion of said street so improved in proportion to the benefits to the same.

5. That thereafter the said former city of New Whatcom let to the lowest responsible bidder the contract to grade and improve said portion of said street, as aforesaid, and that thereafter said portion of said street was so improved under said contract at a cost of
32 $12,968.80, and the said work and improvement was duly accepted by the said former city of New Whatcom and warrants of said city were issued in payment thereof.

6. That said former city of New Whatcom did thereafter levy an assessment upon the lots and tracts of land fronting and abutting on said portion of said street so improved for the purpose of paying the cost of said improvement, after deducting the payments made by the city for improvements made at the corners and intersections of streets, and that said assessment was not made in accordance with the laws governing said city, and that its enforcement has been refused by this court and the supreme court of the State of Washington.

7. That the city council of the city of New Whatcom did on the 18th day of March, 1895, duly pass and adopt its ordinance No. 301, entitled An ordinance providing the method of making, levying, and collecting assessments for local improvements in the city of New Whatcom, Washington, and by a new assessment or reassessment of the cost and expense of making the same upon the property benefited thereby.

8. That the city council of The City of New Whatcom, the plaintiff herein, did on the 10th day of June, 1895, duly pass and adopt its ordinance No. 306, entitled An ordinance ordering and providing for a new assessment or reassessment upon the blocks, lots, and parcels of land which have been or will be benefited by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington, and designating and establishing local improvement district No. 8 "*b*;" which said ordinance was duly approved June 11th, 1895, and published June 18th, 1895.

9. That all of the following-described property, to wit, "All of the right of way of the Bellingham Bay and British Columbia Railroad Company situated in the west half of block 255 and block
33 254, First addition to New Whatcom," is situated in the city of New Whatcom, in Whatcom county, State of Washington, and is situated in and included in the limits of said local improvement district No. 8 "*b*," as defined in said ordinance No. 306.

10. That between the 18th day of June, 1895, and the 22nd day of July, 1895, the above-described premises were duly and separately assessed and set down upon a special assessment-roll under and by virtue of the aforesaid ordinances; that said roll was duly submitted to the city council of the city of New Whatcom, who, after due and legal notice of the time and place of such meeting, did at a regular session of said body hear and consider any and all objections touching the regularity of the proceedings in making said assessment or reassessment and the amount to be assessed and levied upon any block, lot, or tract of land for said improvement, and duly and separately assessed, at the time and place and in the manner aforesaid and as provided by law, the said premises as follows, to wit:

Upon said piece of land described as follows, to wit: "All of the right of way of the Bellingham Bay and British Columbia Railroad Company situated in the west half of block 255 and 254, First addition to New Whatcom, there was duly and separately assessed and levied the sum of $221.00 as the amount of benefits derived or received by said tract of land from said improvement.

11. That upon said premises there was duly and separately levied and assessed, under and in pursuance of said ordinance No. 301 and 306, for the purpose of paying the cost of said improvement, grading, leveling, planking, sidewalking, etc., the sum of $221.00.

12. That the said City of New Whatcom, the plaintiff herein, did on the fifth day of August, 1895, duly pass and adopt its ordinance No. 310, entitled "An ordinance approving and confirming the proceedings in making the assessment or reassessment and the
34 said assessment or reassessment upon the blocks, lots, and parcels of land which have — or will be benefited by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington;" which said ordinance was duly approved Aug. 7th, 1895, and published Aug. 10th, 1895.

13. That on the 23rd day of September, 1895, said tax and assessment of $221.00 was unpaid and became delinquent, and,

14. That the defendant the Bellingham Bay and British Columbia Railroad Company *are* now and *have* been at all times herein mentioned the owners of the above-described real estate.

15. That no part of said sum so assessed and levied upon said property has been paid.

The court finds as conclusions of law:

1. That said assessment, amounting to the sum of $221.00, together with the interest thereon from and after September 23rd, 1895, and at the rate of seven per cent. per annum, and the costs of this action, became and still is a lien upon the premises above set forth in the findings of fact prior and superior to all the rights of the defendant therein.

2. That the plaintiff is entitled to judgment decreeing the foreclosure of said lien upon said premises, and that said premises be sold by the sheriff of Whatcom county, State of Washington, agreeable to the statutes in such cases made and provided and the rules

and practice of this honorable court, and the proceeds applied to the payment of the amount due plaintiff.

3. That the plaintiff is entitled to have all the rights of said defendant in and to said premises and each and every part thereof forever barred and foreclosed, save and except the equity of redemption, as provided by law.

Done in open court this — day of July, 1896.

35 JOHN R. WINN,

Judge of the Superior Court, Whatcom County, Washington.

Indorsed: Filed July 30th, 1896. C. A. Puarica, clerk, by Geo. C. Fisher, deputy clerk. Service accepted July 28th, 1896. Newman and Howard, for defendant.

36 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Exceptions to Findings of Fact and Conclusions of Law.

The court on the — day of July, A. D. 1896, having signed and ordered entered its findings of fact and conclusions of law in this cause, finding for the plaintiff and against the defendant, the defendant now herewith files as its exceptions to the findings of fact and conclusions of law heretofore signed by this court the following, to wit:

1st. The defendant excepts to the fourth finding of fact contained in said findings of fact upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.

That the same is contrary to the evidence.

That the same is contrary to law.

2nd. The defendant excepts to the fifth finding of fact contained in said findings of fact upon the ground- and for the reasons following:

Insufficiency of the evidence to justify the same.

That the same is contrary to the evidence.

That the same is contrary to law.

37 3rd. That the defendant excepts to the sixth finding of fact contained in said findings of fact upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.

That the same is contrary to the evidence.

That the same is contrary to law.

4th. The defendant excepts to the tenth finding of fact contained in said findings of fact upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.

5th. The defendant excepts to the eleventh finding of fact contained in said findings of fact upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.

6th. The defendant excepts to the thirteenth finding of fact contained in said findings of fact upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.

7th. The defendant excepts to the first conclusion of law contained in said conclusions of law upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.
That the findings of fact are insufficient to justify the same.

38 8th. The defendant excepts to the second conclusion of law contained in said conclusions of law upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.
That the findings of fact are insufficient to justify the same.

9th. The defendant excepts to the third conclusion of law contained in said conclusions of law upon the grounds and for the reasons following:

Insufficiency of the evidence to justify the same.
That the same is contrary to the evidence.
That the same is contrary to law.
That the findings of fact are insufficient to justify the same.

NEWMAN AND HOWARD,
Attorneys for Defendant.

Indorsed: Filed July 30th, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

Service of the within exceptions is hereby acknowledged and admitted, and copy thereof received this — day of July, '96, at New Whatcom.

T. E. CADE,
Att'y for Pl'f.

39 In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE B. B. and B. C. R. R. Co., Defendant. } 4667. Decree.

This cause having come on regularly for trial upon the 17th day of July, 1896, upon the issues formed by the complaint, answer, and reply, the plaintiff appearing by T. E. Cade, D. W. Freeman, and Kerr and McCord, its attorneys, and the defendant by Newman and Howard, its attorneys, and the court having heard all of the testimony and the argument of respective counsel, and having inspected the pleadings and files in this cause, and having heretofore made and entered its findings of fact and conclusions of law herein, and it appearing therefrom that the plaintiff is entitled to a judgment and decree: Now, therefore,—

It is ordered, considered, adjudged, and decreed the plaintiff herein has a valid and existing lien for the sum of $221.00 and the interest thereon from and after September 23rd, 1895, at the rate of seven per cent. per annum amounting to $——, upon all of the following-described land, to wit, "All of the right of way of the Bellingham Bay and British Columbia Railroad Company situated in the west half of block-254 and 255, in the First addition to New Whatcom, in the city of New Whatcom, in Whatcom county, State of Washington."

It is further ordered, adjudged, and decreed that plaintiff's lien in the sum of $221.00 and interest thereon from and after Sept. 23, 1895, at the rate of seven per cent. per annum, against said property, to wit, "All of the right of way of the Bellingham Bay and British Columbia Railroad Company situated in the west half of
40 block-254 and 255, First addition to New Whatcom," be, and the same is hereby, foreclosed, and that said defendant, The Bellingham Bay and British Columbia Railroad Company, be and is hereby forever barred and foreclosed of and from all right, title, and interest in and to said premises and each and every part thereof, save and except the equity of redemption, as provided by law.

It is further ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant the costs of this action, which costs are hereby taxed at $33.10, and that the same be and is hereby declared to be an additional lien upon and against said property prior and superior to the rights and claims of the defendant therein.

It is further ordered, adjudged, and decreed that said premises be sold by the sheriff of Whatcom county pursuant to the statutes in such cases made and provided and the rules and practice of this honorable court, and that the proceeds of such sale be applied, 1st, to the payment of the costs of such sale; 2nd, to the payment of the costs of this action; and, 3rd, to the payment of the amount due plaintiff under its said lien hereby foreclosed; and, 4th, that the overplus, if any, be paid to the person or persons lawfully entitled thereto.

It is further ordered, adjudged, and decreed that the plaintiff may become purchaser at said sale, and that said purchaser at such sale be placed in immediate possession of said premises by the sheriff of Whatcom county without any other or further order of this court to all of which the defendant at the time asked and is allowed an exception.

Done in open court this 1st day of Aug., 1896.

JOHN R. WINN,
Judge of Above-entitled Court.

Indorsed: Filed Aug. 4th, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

41 In the Superior Court, Holding Terms at New Whatcom, State of Washington.

CITY OF NEW WHATCOM, Plaintiff,
vs.
B. B. AND B. C. R. R. Co., Defendant. } Cost Bill. No. 4667.

—— ——, attorney for —— ——, to the clerk of the above-entitled court. Dr.

To clerk's fees	$12 00
sheriff's fees	80
attorney's fees	10 00
notary fees, verifying complaint and cost bill	50
—— ——, abstractor fees, looking up title	50
witness fees: J. K. Appleby, 1 day, 2 miles	2 20
certified copies of ordinance #301, 3,500 wds. at 10c..	
" " " #306, 800 wds. at 10c..	7 10
" " " #310, 800 wds. at 10c..	
" " asses't-roll, 2,000 wds. at 10c	

STATE OF WASHINGTON, } ss:
County of Whatcom, }

T. E. Cade, being first duly sworn, deposes and says that he is one of pl'ff's att'ys in the above-entitled action, and that the
42 foregoing is a full, true, and correct statement of the taxable costs and the pl'ff's necessary disbursements in said action.

T. E. CADE.

Subscribed and sworn to before me this 30th day of July, A. D. 1896.

D. W. FREEMAN,
Notary Public.

Indorsed: Filed August 8th, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

43 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Motion to Retax Costs.

Comes now the defendant above-named and moves the court to retax the costs by the clerk of this court taxed against the defendant in this cause, the taxation of which said costs was by the said clerk made pursuant to the cost bill by the plaintiff filed in this cause with the clerk of said court on the — day of August, A. D. 1896.

1st. That, as appears from said cost bill and said taxation of costs, there is taxed against the above-named defendant and in favor of the plaintiff the following items, to wit:

$-.50 abstractor's fees.

$—, copy of record in cause No. — (offered in evidence by the plaintiff).

$7.10 for copy of ordinances and assessment-roll (offered in evidence by the plaintiff).

That each and every of said amounts are improper and illegal items to be taxed against the defendant in this cause and in
44 favor of the plaintiff, and that the same and each of the same should be retaxed in the entire amount thereof.

Wherefore the defendant asks this court to retax said costs in the above-specified items and to disallow the same and each and every part of the same and to release the defendant therefrom.

That this motion is based upon the said cost bill by the plaintiff filed in this cause and upon all the records and files in this cause.

NEWMAN AND HOWARD,
Attorneys for Defendant.

STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, Thomas G. Newman, being first duly sworn, on oath state that I am one of defendant's attorneys in the above-entitled action; that I have heard read the foregoing motion, know the contents thereof, and believe the same to be true.

THOMAS G. NEWMAN.

Subscribed and sworn to before me this 8th day of August, 1896.

C. W. HOWARD,
Notary Public in and for the State of Washington,
Residing at Fairhaven.

Service of the within motion is hereby acknowledged and admitted and copy thereof received this — day of August, A. D. 1896, at New Whatcom.

T. E. CADE,
Attorney for Plaintiff.

Indorsed: Filed this 8th day of August, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

45 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

On this the 8th day of August, A. D. 1896, this cause coming regularly on for hearing upon motion of the defendant, filed herein, to retax some of the costs taxed by the clerk and set out in the plaintiff's cost bill on file in this action, the plaintiff appearing by its attorneys, T. E. Cade, D. W. Freeman, and Messrs. Kerr and McCord, and the defendant appearing by its attorneys, Messrs. Newman and Howard, and after listening to the argument of counsel thereon and being fully advised in the premises, the court orders as follows:

That the defendant's motion to retax the sum of fifty cents abstractor's fees for search of title be, and the same is hereby, allowed; to the allowance of which the plaintiff at the time asks and is allowed an exception.

That the defendant's motion to retax the sum of $7.10 for copies of ordinances and the assessment-roll, introduced in evidence by the plaintiff, be, and the same is hereby, denied; to the denial of which the defendant at the time asks and is allowed an exception.

46 It is further ordered that the decree heretofore signed in this matter, in so far as the amount of the costs adjudged to the plaintiff therein, be, and the same is hereby, directed to be revised and amended in conformity to this order.

Done in open court this the 8th day of August, A. D. 1896.

JOHN R. WINN,
Judge of said Court.

O K.
NEWMAN AND HOWARD.

O K.
T. E. C., *Att'y for Pl'ff.*

Endorsed: Filed Aug. 22nd, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

47 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Notice of Appeal.

To the city of New Whatcom, a corporation, plaintiff in the above-entitled cause, and to T. E. Cade, D. W. Freeman, and Kerr and McCord, plaintiff's attorneys:

You are hereby notified that the defendant, The Bellingham Bay and British Columbia Railroad Company, a corporation, appeals from the final judgment of the superior court of Whatcom county, Washington, in the above-entitled cause; which said judgment was heretofore entered in said court on the fourth day of August, A. D. 1896, and recorded in Journal —, at page — thereof, of the journals of said court, to the supreme court of the State of Washington, and that this appeal is taken from the whole of said judgment.

NEWMAN AND HOWARD,
Attorneys for Defendant.

Service of the above notice of appeal is hereby acknowledged and accepted and a copy of said notice received at New Whatcom, Washington, this the 19th day of Sept., A. D. 1896.

T. E. CADE,
Attorney for Plaintiff.

Endorsed: Filed this 19th day of September, A. D. 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy.

48 In the Superior Court of Whatcom County, State of Washington.

THE CITY OF NEW WHATCOM, Respondent,
vs.
THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Appellant. } No. 4767.

Appeal Bond.

Know all men by these presents that we, the Bellingham Bay and British Columbia Railroad Company, a corporation, as principal, and Edward Fischer, as surety, are held and firmly bound unto the city of New Whatcom, a municipal corporation, in the penal sum of five hundred dollars; for the payment of which sum, well and truly to be made, we do bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed with our seals this the fourth day of August, A. D. 1896.

The conditions of the above obligations are such that whereas the above-named bounden principal, the Bellingham Bay and British Columbia Railroad Company, has appealed from the final judgment of the superior court of Whatcom county, State of Washington, in the above-entitled cause, entered on the fourth day of August, A. D. 1896, and recorded in Journal —, at page — thereof, of the journals of said court, to the supreme court of the State of Washington:

Now, therefore, if the appellant shall pay all costs and damages that may be awarded against it on said appeal or on the dismissal thereof, not exceeding the sum of five hundred dollars,
49 and shall satisfy and perform the judgment appealed from herein in case it shall be affirmed, and any judgment or order which the supreme court may render or make or order rendered or made by said superior court, and shall pay all rents of or damage to the property accruing during the pendency of this appeal out of the possession of which the respondent shall be kept by reason of this appeal, upon which the lien of the respondent has been established by said superior court in this action, then this obligation to be void; otherwise to be and remain in full force and virtue.

In testimony whereof we have hereunto set our hands and seals the day and year first above written, the said Bellingham Bay and British Columbia Railroad Company having caused the same to be signed by its president.

BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY,
By P. B. CORNWALL, *President.* [SEAL.]
EDWARD FISCHER. [SEAL.]

50 STATE OF WASHINGTON, } ss:
County of Whatcom, }

Edward Fischer, being first duly sworn, says that he is a resident of the said county and State, and is worth the sum of five hundred dollars, over and above all debts and liabilities, in property within said State, exclusive of property exempt from execution.

EDWARD FISCHER.

Subscribed and sworn to by Edward Fischer before me this the fourth day of August, A. D. 1896.

C. W. HOWARD,
[SEAL.] *Notary Public in and for the State of Washington, Residing at Fairhaven.*

Service of the within appeal bond is hereby acknowledged and admitted and copy thereof received this 19th day of Sept., A. D. 1896, at New Whatcom.

T. E. CADE,
Attorneys for Respondent and Plaintiff.

Endorsed: Filed this 19th day of September, A. D. 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy clerk.

51 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Stipulation.

The undersigned attorneys for the plaintiff hereby agree that the time in which to prepare and file the statement of facts in the above-entitled cause was by stipulation with the attorneys for the defendant extended until the 19th day of September, A. D. 1896; that on the 19th day of September, A. D. 1896, the statement of facts in the above-entitled cause was first filed with the clerk of the above-entitled court; and thereafter, to wit, on the 19th day of September, 1896, and subsequent to the filing of said statement of facts, as aforesaid, the same was duly served upon the undersigned, as attorneys for the plaintiff in this cause, and a true copy of said statement of facts at said time of such service delivered to them.

Dated at New Whatcom this the 19th day of September, A. D. 1896.

T. E. CADE,
Attorneys for Plaintiff.

Endorsed: Filed Sept. 19, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy.

52 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD CO., Defendant. } No. 4667.

STATE OF WASHINGTON, } *ss:*
County of Whatcom, }

I, C. A. Puariea, county clerk and clerk of the superior court of the county and State aforesaid, do hereby certify that the above and foregoing is a full, true, and correct copy of the entire record and files in the above-entitled cause, which I am requested by appellant to transmit to the supreme court on appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of our said superior court, at my office, in said city of New Whatcom, on this 27th day of August, A. D. 1896.

C. A. PUARIEA,
[SEAL.] *Clerk as Aforesaid.*

53 No. 2361.
Filed Sep. 29, 1896.

C. S. REINHART, *Clerk.*

54 In the Superior Court of the State of Washington, Whatcom County.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD, Defendants. } No. 4667.

JULY 17TH, 1896.

Appearances: T. E. Cade and D. W. Freeman and Kerr and McCord, for plaintiff; Newman and Howard, for defendant.

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55 J. K. APPLEBY, being first duly called, sworn, and examined, testified as follows:

Direct examination by Mr. CADE:

Q. State your name.
A. J. K. Appleby.
Q. Where do you reside?
A. In New Whatcom.
Q. What is your business?
A. City clerk.

Mr. HOWARD: It is agreed that Mr. Appleby is the city clerk of the city of New Whatcom.

Q. You have in your possession as city clerk the records of the city of New Whatcom?
A. Yes, sir.
Q. State, if you know, what this book is. (Hands book to the witness.)
A. The record of the ordinances of the city of New Whatcom.

Mr. CADE: We will have this marked Plaintiff's Exhibit "A."

56 Q. Mr. Appleby, referring to Exhibit "A," can you find therein ordinance 310 of the city of New Whatcomb?
A. Yes, sir.
Q. You have it there?
A. Yes, sir.
Q. On what pages?
A. Pages 121 and 122.
Q. Pages 121 and 122?
A. Yes, sir.
Q. Is that your signature at the bottom?
A. Yes, sir.
Q. And is that certificate at the bottom yours?
A. Yes, sir.
Q. And the signature of the mayor?
A. Yes, sir.

Mr. CADE: We now offer in evidence ordinance No. 310 of the city of New Whatcom, as shown on pages 121 and 122, together with the clerk's certificate at the bottom thereof, showing when the same was passed, approved, and published, and ask that the same may be marked Plaintiff's Exhibit "B."

Mr. HOWARD: What is your object?

Mr. CADE: For what it shows on its face. I will offer it later. We will now offer in evidence ordinance 301, found on pages 99 to 107, inclusive, of Plaintiff's Exhibit "A," "An ordinance pro-
57 viding the method of making, levying, and collecting assessments for local improvements in the city of New Whatcom, Washington, by a new assessment or reassessment of the cost and expense of making the same upon the property benefited thereby." We offer to file in lieu of the original a certified copy, as certified to by the clerk, and ask that the same be marked as Plaintiff's Exhibit "C." It is agreed between counsel for plaintiff and defendant that the said ordinance "C" was duly published.

Mr. HOWARD: To the substitution of the certified copy defendants make no objection and makes no objection to the ordinance simply for the purpose of showing that such ordinance was passed, but for all other purposes, and especially for the purpose of proving any of the recitals of said ordinance by said ordinance, defendants object as not the best evidence, and also as incompetent, irrelevant, and immaterial.

COURT: Objection overruled; exception allowed.

Q. Referring to Plaintiff's Exhibit "A," as identified by you, can you find ordinance No. 306?

A. Yes, sir.

Q. Have you it there?

A. Yes, sir.

Q. On what pages?

A. Pages 114, 115, and 116.

Q. (Indicating.) Is that your signature?

58 A. Yes, sir.

Q. Is that your signature to the certificate?

A. Yes, sir.

Mr. CADE: We now offer in evidence ordinance No. 306 of the city of New Whatcom, "An ordinance ordering and providing for a new assessment or reassessment upon the blocks, lots, and parcels of land which have been or will be benefitted by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington, and designating and establishing local improvement district No. 8 '*b*.'" We ask to file in lieu of the original a certified copy of the same, certified to by the city clerk, and ask to have — marked Plaintiff's Exhibit "D." It is stipulated and agreed between counsel that this ordinance was properly published by the city.

Mr. HOWARD: To the filing of the certified copy instead of the original defendant makes no objection, and no objection to the admission of such ordinance to prove it was passed, but for all other

purposes, and especially for the purpose of proving any recitals contained in said ordinance, defendant objects as not the best evidence, and as incompetent, irrelevant, and immaterial.

COURT: Objection overruled; exception allowed. The ordinance is admitted in evidence. As to how far the court will accept
59 it as proving its recitals on its face will be determined at the close of the case, and the court will not accept it for anything but what it is legally entitled to in the trial of the cause.

Q. As city clerk of the city of New Whatcom, do you have in your charge the assessment-rolls relative to street improvement?

A. Yes, sir.

Q. Have you in your possession the reassessment-roll for the improvement of Elk street east to North street, in the city of New Whatcom, Washington, for district "B"?

A. Yes, sir.

Q. Examine this paper and state if that is it.

A. It is a copy.

Q. Have you the original roll?

A. Yes, sir.

Q. (Handing witness paper.) Is that it?

A. Yes, sir.

Q. Is that the reassessment-roll in your office showing the "List of all the lots, blocks, and tracts of land in local improvement district No. '8 B,' and fronting and abutting upon that portion of Elk street between Elk street east and North street, in the city of New Whatcom, Washington, together with the amount assessed and levied upon each to pay the cost and expense of improving said portion of Elk street as heretofore improved by the former city of New Whatcom, ordinance providing for a reassessment of the cost and expense of such improvement, passed by the city council on
60 the 10th day of June, 1895, approved the 11th day of June, 1895, and published June 18th, 1895"—is it?

A. Yes, sir.

Mr. APPLEBY: We now offer in evidence the reassessment-roll and ask to have the same marked Plaintiff's Exhibit "E," together with the certificate of the clerk, the report of the committee, the warrant of collection, and the treasurer's return, as shown on the back of said assessment-roll, and ask to file in lieu of the original a certified copy thereof.

Mr. HOWARD: To said offer the defendant objects upon the ground and for the reason that the same is incompetent, irrelevant, and immaterial, and is not such an assessment-roll as is contemplated by or provided for by law, and upon the ground and for the further reason that said roll upon its face shows that the amounts assessed upon the property therein described are assessed in proportion to the number of feet of said block, lot, or tract of land fronting or abutting on said improvement and included in said improved boundary. We make no objections to the certified copy.

COURT: Objection overruled; exception allowed.

Q. Referring again to Plaintiff's Exhibit "A," the book identified by you, will you turn to ordinance 310 again?

A. I have it.

Q. On what pages do you find that ordinance?

61 A. Pages 121 and 122.

Q. Mr. Appleby, is that your signature at the bottom?

A. Yes, sir.

Q. Is that your signature to the certificate?

A. Yes, sir.

Q. And your signature signed to the ordinance?

A. Yes, sir.

Mr. CADE: We offer in evidence ordinance 310, "An ordinance approving and confirming the proceedings in making the assessment or reassessment and the assessment or reassessment upon the blocks, lots, or parcels of land which have been or will be benefited by the improvement of Elk street from its intersection with Elk street east to North street, in the city of New Whatcom, Washington," and ask to file a certified copy in lieu of the original as Plaintiff's Exhibit "B," and it is agreed between counsel for plaintiff and defendant that this ordinance has been properly published.

Mr. HOWARD: We make no objections to the certified copy or this ordinance to show it was passed, but we object to it for the purpose of establishing any of the facts or recitals therein contained as not the best evidence, and as incompetent, irrelevant, and immaterial.

COURT: Objection overruled; exception allowed.

62 Mr. CADE: We desire to introduce in evidence the complaint, amended answer, reply, and judgment of this court and the remittitur and judgment of the supreme court in cause No. 992 of the files of this court, together with the exhibits in that case, including the assessment-roll.

Mr. HOWARD: To the offer the defendant objects upon the ground and for the reason that the same are incompetent, irrelevant, and immaterial, and for the further reason that the said cause introduced in evidence shows upon its face that the same did not involve any of the property named in this action, and that the defendant in this action is in no manner a party to said suit, and upon the further ground that the said assessment-roll offered as an exhibit in said cause shows upon its face that the assessment therein mentioned was levied and payable on the 6th day of November, 1890, and that the same was levied and payable prior to the 1st day of April, 1891, and that none of the real estate described in this action, entitled The City of New Whatcom *vs.* The Bellingham Bay and British Columbia Railroad, was ever sold under said assessment prior to the first day of November, 1892, and that the same on said day ceased to be a lien on said land.

COURT: Objection overruled; exception allowed.

Mr. HOWARD: It is admitted by counsel for plaintiff and defendant that no action or actions are or were ever instituted by plaintiff or any person for the foreclosure and collection of the levy

63 and assessment mentioned in paragraph 6 of said complaint

against the lands described in plaintiff's said complaint or any portion there-.

Mr. CADE: We rest.

Mr. HOWARD: The defendant now moves for a nonsuit in this case upon the ground and for the reason that no evidence has been offered to establish any of the allegations of paragraph IV of plaintiff's complaint and paragraphs V and VI of said complaint, and the X, XI, XII, and XIII paragraphs of said complaint, and that no proper or sufficient evidence has been introduced to support plaintiff's cause of action set out in said complaint, and for the further reason that the said assessment-roll introduced in evidence shows upon its face that the same was illegally assessed, and not according to the benefits, but according to the front footage, and for the further reason that in paragraph two of defendant's seventh answer herein contained, which is not denied by plaintiff's reply, it is shown that the ground undertaken to be assessed and foreclosed in this action for said improvement is a portion of the right of way of defendant railroad company, and that as such it can derive no benefit by such alleged improvement, and that it is contrary to law and public policy to foreclose a lien for street assessment upon a portion of the right of way of the railroad in operation, as
64 defendant's railroad is shown to be in said answer.

COURT: I will deny the motion and allow an exception.

Mr. HOWARD: We rest.

COURT: Are you going to introduce any evidence?

Mr. HOWARD: No, sir; we rest our case.

65 I hereby certify that the within is a true and correct transcript of my notes taken at the time of the trial of The City of New Whatcom *vs.* The Bellingham Bay and British Columbia Railroad Company.

RALLAN M. PORTER,
[SEAL.] *Court Reporter.*

Subscribed and sworn to before me this 23d day of July, A. D. 1896.

C. A. PUARIEA,
County Clerk and Clerk of the Superior Court of Whatcom Co., Wash.

66 PLAINTIFF'S EXHIBIT "G."

In the Superior Court of Whatcom County, State of Washington.

THE CITY OF NEW WHATCOM, Plaintiff, *vs.* E. F. G. CARLYON, J. E. BAKER, and OLIVE E. BAKER, His Wife, Defendants.	No. 992. Action to Foreclose Street Assessment Lien. Amended Complaint.

For amended complaint, after leave of court first had and obtained, plaintiff for cause of action against the above-named defendant alleges as follows, to wit:

First. That the plaintiff is a municipal corporation of the third class, incorporated and existing under and by virtue of the laws of the State of Washington.

Second. That on, to wit, the 16th day of February, 1891, the plaintiff became the lawful successor of the former cities of Whatcom and New Whatcom, Washington, which were municipal corporations existing under the laws of the Territory and State of Washington respectively, said successorship being by virtue of the consolidation of said cities of Whatcom and New Whatcom as one municipal corporation by the name of the city of New Whatcom, which consolidation was consummated under and in conformity with the general laws of the State of Washington, said former city of Whatcom having been incorporated by virtue of an act of the legislature of the Territory of Washington entitled "An act to incorporate the
67 city of Whatcom," passed November 24th, 1883, and said former city of New Whatcom having been incorporated under and in conformity with the general laws of the State of Washington

Third. That the following-described lots and premises, to wit, lots 22, in block 140; lots 33, 1, 29, 30, 31, and 32, block 143, all in the plat of First addition to New Whatcom, are situated in The City of New Whatcom, plaintiff herein, and were situated in the former city of New Whatcom, Whatcom county, State of Washington, prior to its consolidation aforesaid, and abut and front on Elk street, in the said city of New Whatcom, as follows, viz., lot 22, *block* in block 140, and lot 1, in block 143, having a frontage of 100 feet each; lots 30, 31, 32, and 33, in block 143, having a frontage of 25 feet each on said Elk street, and lot 29, in block 143, having a frontage of 35 feet on said Elk street.

Fourth. That on the 28th day of June, 1890, the said former city of Whatcom duly passed its ordinance No. 36, entitled "An ordinance to provide the method of assessing and levying upon real property the expense of improvements made in front of the same."

Fifth. That on the 11th day of June, 1891, the said former city of New Whatcom duly passed its ordinance No. 20, entitled "An ordinance No. 20, providing for the letting of contracts by the city of New Whatcom."

Sixth. That on, to wit, July 19, 1890, the said former city of New Whatcom duly adopted a resolution by its council, whereby
68 it was ordered and directed that that portion of Elk street between the intersection of said Elk street east, in said city, and the northerly side of North street be improved by grading, leveling, planking, and construction of sidewalk, and assessing the cost of such improvements upon the said described lands fronting and abutting upon said portion of said street in said city.

Seventh. That on, to wit, 5th day of August, 1890, the said city of New Whatcom let to the lowest responsible bidder the contract to grade and improve said portion of said street, as aforesaid, and that thereafter said portion of said street was so improved under said contract at a cost of $12,968.80, and the said work and improvement was accepted by the said former city of New Whatcom.

Eighth. That between the 1st day of October, 1890, and the 27th day of October, 1890, the above-described premises were under and by virtue of the aforesaid ordinance No. 36 duly and separately assessed and set down upon a special assessment-roll; that said roll was duly submitted to the board of equalization of said former city of New Whatcom and was by said city duly equalized, and said premises were duly and separately assessed, at the time and place and in the manner aforesaid and as provided by law, to said defendant- E. F. G. Carlyon & J. E. Baker, as follows, to wit:

The sum of $134.50 was duly assessed upon lot 22, in block 140; the sum of $32.10 was duly assessed upon lot 33, in block 145; the sum of $131.25 was duly assessed upon lot 1, in block 143;
69 the sum of $34.58 was duly assessed upon lot 30, in block 143; the sum of $33.60 was duly assessed upon lot 31, in block 143, and the sum of $32.15 was duly assessed upon lot 32, in block 143, as the amounts of benefits derived by said lots respectively from the improvements of said section of Elk street and as the sums sufficient to pay the cost of said improvements in front of the said lots respectively to the center of the street.

Ninth. That upon said premises there was duly and separately levied under and (*in*) pursuant to said ordinance No. 36, for the purpose of paying the cost of said improvement—grading and planking and construction of said walk of said portion of said street as aforesaid—the several sums of money so assessed and mentioned in paragraph number eight herein, amounting to the sum of $446.66, all of which is due, delinquent, and unpaid.

Tenth. That on the 7th day of January, 1891, said tax and assessment of $446.66 was unpaid and became delinquent, and with interest at the rate of ten per cent. per annum from 7th day of January, 1891, and costs of collection thereof, became and still is a lien upon the said premises.

Eleventh. That defendant- J. E. Baker & Olive E. Baker are husband and wife and were at the time said premises were so assessed and still are husband and wife, and the defendants were at said times and are now the owners of the said premises above described and are liable for and in duty bound to pay the said assessments herein specified and assessed and levied against the same.

70 Twelfth. That the defendant- J. E. Baker and Olive E. Baker have or claim to have some interest in and to said premises, but whose interests are subsequent and inferior to plaintiff's lien thereon.

Thirteenth. That no part of said assessment upon said lots or any of them has been paid, and there is now due and owing the plaintiff upon said assessment for said improvements aforesaid the sum of $446.66 and interest thereon since the 7th day of January, 1891, at the rate of ten per cent. per annum, and that the said defendant- refused and still refuses to pay the same, although requested so to pay

Fourteenth. That there is also due plaintiff on account of the bringing this action the sum of $25.00 for attorneys' fees, as provided by law.

Wherefore the plaintiff prays judgment against the said defend-

ants; that plaintiff have and recover judgment against the said defendant- for the sum of $446.66 and interest since January 7th, 1891, at 10% per annum, and the sum of $25.00 as attorneys' fees, and costs and disbursements of this action.

That the said sum shall be declared a lien upon the said premises prior and superior to the interest of all the defendants; that said lien be foreclosed; that said premises be sold to satisfy the claims of plaintiff aforesaid, and that the rights of all the defendants in and to said premises be forever foreclosed and barred, and that plaintiff may have such further and other relief as to the court seems
71 meet and equitable in the premises.

E. H. FARNUM &
J. R. CRITES,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Whatcom, } ss:

I, W. L. Miller, as mayor of the plaintiff above named, being duly sworn, say that the foregoing complaint is true as I verily believe.

W. L. MILLER.

Subscribed and sworn to before me this 30th day of August, 1892.

JOHN R. CRITES,
Notary Public in and for State of Washington.

Residence, New Whatcom.

(Endorsed on back:) No. 992. In the superior court of Whatcom county, State of Washington. The City of New Whatcom, plaintiff, *vs.* E. F. G. Carlyon *et al.*, defendant-. Amended complaint. Filed Sept. 1st, 1892. C. C. Nixon, clerk, by H. H. Peirce, dep'ty. E. H. Farnham and J. R. Crites, attorneys for plaintiff.

72 PLAINTIFF'S EXHIBIT "H."

In the Superior Court of the State of Washington in and for Whatcom County.

THE CITY OF NEW WHATCOM, Plaintiff, *vs.* E. F. G. CARLYON, J. E. BAKER, and OLIVE E. BAKER, Defendants.	Answer to Amended Complaint.

Comes now the above-named defendants and for an answer to the amended complaint filed in the above-entitled action say:

That they deny the allegations contained in paragraphs one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, and fourteen of the said amended complaint and each and every part thereof, and deny that the said city of New Whatcom have any lien of any character upon the premises described in the said amended complaint, or that any moneys of any character are due from said

defendants or any of them to the said city of New Whatcom; and deny that any valid assessment of any character has at any time been made upon any of the premises described in said amended complaint for street improvements abutting upon said property or otherwise; and deny that any of the said ordinances or
73 resolutions referred to in the said amended complaint were regularly passed at the dates therein specified or at any other time; and deny that said contracts were let in the manner specified in said amended complaint, or were properly or legally let in any manner whatever; and deny that the costs of the said work referred to in said amended complaint was the amount named in said amended complaint or any other sum whatever; and deny that any improvements of any character have been made by the said city of New Whatcom, or the former city of New Whatcom, in the manner set forth in said amended complaint or in any such manner as to charge the premises named in said amended complaint with any part of the cost thereof; and deny that said lots referred to in said amended complaint have been duly or separately assessed or set down upon said special assessment-roll or any assessment-roll; and deny that said assessment-roll was ever duly submitted to the board of equalization of the said city or was submitted to said board at all; and deny that the same are equalized, or that the said premises were separately assessed at the time and at the time and placed named in the said amended complaint or at any other time; and these defendants deny generally each and every allegation in the said amended complaint.

Further answering the said amended complaint of the said plaintiffs, and by way of an affirmative defense thereto, these defendants aver and charge the truth to be that at the time that the resolution referred to in the sixth paragraph of said amended com-
74 plaint is alleged to have been passed and adopted by the said former city of New Whatcom no official grade had been established upon any portion of said street by the said former city of New Whatcom or otherwise.

II.

That the said former city of New Whatcom never settled with or offered to settle with these defendants or any of them, or any of the owners of the property abutting upon any portion of the said street, for damages which would be sustained, and which were sustained by the said property, by reason of the cutting and grading of the said street in front thereof.

III.

That no ordinance was ever passed by the said former city of New Whatcom authorizing, permitting, directing, or ordering said work or improvement or any part thereof to be made at any time upon said Elk street or any portion thereof, or that the said former city of New Whatcom had any power to order or direct said work or improvement or any part thereof to be done or made by resolution.

IV.

That no notice of any kind or character of the intention to so improve said Elk street or any portion thereof or to improve the same in any manner or at all was ever published or given by the said former city of New Whatcom to defendants or any of them or at any time in any manner or at all.

V.

75 That said street, running to a considerable distance, to wit, about twelve hundred feet by unplatted and unimproved lands, which said unplatted lands covered a large area, to wit, seven and thirty-four hundredths acres, and extended from said Elk street in one unplatted tract for a distance of two hundred and seventy feet, and then fronts upon another street, to wit, Railroad avenue, and that the lots referred to in said amended complaint as front upon the said Elk street are only one hundred and twenty-five and one hundred and thirty-five feet deep and thirty feet and fifty feet in width, and that said assessment is claimed to have been made upon said entire tract of unplatted land and said lots together with and as a part of the same act, and that the same appears upon the same assessment-roll and as a part thereof, and that if the said ordinance referred to in said amended complaint as numbered thirty-six was ever passed or adopted by said former city of New Whatcom the same was and is wholly void for the reason that said former city of New Whatcom was without power or authority to pass the same or ordain the matters and things set forth therein.

VI.

That neither at the time alleged in the said amended complaint or at any time before or since the said resolution referred to in the said sixth paragraph of the said amended complaint is alleged to have been passed by the said city council had the said city council of the said former city of New Whatcom any lawful right or authority to bind or charge or in any manner encumber said real estate referred to in said amended complaint or any part thereof or any other real estate by any of the matters or things in the said
76 pretended resolution or subsequent proceedings claimed to have been had or done, or in any manner or at all, for the reason that at and during all of the times referred to in the said amended complaint the said former city of New Whatcom was not authorized by law to improve said Elk street or any part thereof, or any other street, at the expense of the abutting property or the owners thereof.

VII.

Defendants, further answering the said amended complaint, aver that the work and improvement and pretended assessment and levies referred to in said amended complaint was not done, made, or performed in accordance with the terms of the said pretended ordinance numbered thirty-six, in this:

A. That no ordinance or resolution was ever passed or adopted by said former city of New Whatcom designating streets or parts thereof upon which said improvements are claimed to have been made, or character of the work to be done, or materials to be used, as provided by section 1 of said pretended ordinance number 36.

B. That no such ordinance or resolution was ever published; that the city assessor of said former city did not within ten days thereafter proceed to list values or assess all or any of the lots or tracts of land situated within the limits of or fronting upon the said street or parts thereof, and that the said assessor did not include any structures upon said lots or any of them in accordance with the
77 requirements of any ordinance of said former city of New Whatcom, and that said assessor did not in a separate column of any assessment-roll used by him in any listing enter opposite the description of each or either of said lots the true length or any length of the frontage of the same; that said city assessor did not return any assessment-roll to the city clerk of the said city duly verified or verified at all by his oath; all of which is provided by section 11 of said pretended ordinance number 36.

C. That the said city council did not let any contract to perform said work to the lowest responsible bidder, after due notice, as required by said ordinance number 20 and by section three of said ordinance number 36.

D. That said city council did not proceed to ascertain the expense of such work or the expense proportionately to the whole or exactly of the space covered by any intersections of streets or alleys, and did not deduct from the total expense the net expense thereof; that such total expense, deductions, or net expense does not appear upon any assessment-roll in separate items; that no assessment-roll, with the certificate of the clerk certifying the aforesaid items, *were* duly ascertained by said city council at a regular session or adjourned meeting or giving the date of the same was ever prepared or fil*l*ed, as provided by section IV of said pretended ordinance number 36.

E. That no assessment-roll was delivered to a committee of three or to any other committee appointed by the said city
78 council from its members to examine the property designated therein; that no such committee examined said lots or lands or any part thereof described in plaintiff's said amended complaint, as provided in section V of said pretended ordinance number 36.

F. That the said city council did not proceed to or examine the assessment-roll and did not and never did equalize the values of the property or any part thereof described in plaintiff's said amended complaint, and did not estimate the benefits conferred upon each lot or tract of land or either lot or tract thereof, and did not affix or determine what part, if any, of such expense, not including the required deductions, should be paid from the general funds of the said city; that said city council did not at any time or at all or in any manner ever assess or levy upon each or either of said lots or tracts of land the net amount thus ascertained or any amount as the benefits accruing to said lots or tracts of land or either of them by reason of such public work, and did not place the amount to be

paid by the city or the net amount levied upon the property in separate columns of said assessment-roll, as provided by section VI of said pretended ordinance number 36.

G. That no committee of said council in attempting to make any assessment or levy followed any general rule of equality or justness, as provided by section VII of said pretended ordinance number 36.

79 H. That no assessment-roll was ever equalized or adjusted or laid over to any regular session of said council for the purpose of hearing or determining any complaints made against such assessors' descriptions, names, or owners or values of property, as provided by section VIII of said pretended ordinance number 36, and no record of any equalization of said property or any part thereof was entered in the clerk's records, as required by said section VIII; that no meeting of said city council, as provided by said section VIII, for the purpose of equalizing said assessments, was ever held, and that said pretended assessments were never equalized in any manner or at all by said city council of the former city of New Whatcom.

I. That no notice of any such meeting of the said city council was ever given or published, as provided by section X of said pretended ordinance number 36.

J. That no copy of a notice was attached to any assessment-roll at the time of any pretended meeting of said city council claimed to have been held for the purpose of equalizing said assessment, and that no affidavit of the printer or publisher or foreman of a newspaper that any such notice had been published was annexed to any such printed copy thereof, and no affidavit or proof of publication was before the said city council at any such meeting, as provided by section XI of said pretended ordinance number 36; and defendant avers and charges the fact to be that if such city council ever did hold such meeting for the purpose of equalizing said assess-

80 ments or said assessment-roll, that said meeting was not warranted by law or ordinance of the said city of New Whatcom, and that said meeting was without jurisdiction and its acts and all of them in the premises were wholly void, and that said city council so acting or pretending to act at any such meeting was without jurisdiction in the premises, and that no assessment, levy upon, or charge against the said real estate or any part or portion thereof was ever made by said city council or any other person or persons representing or claiming to represent or acting for or in behalf of the said former city of New Whatcom.

And, further answering, defendant avers that no notice was ever given defendant of any such meeting to be held or which was held for the purpose of equalizing said assessment or levying same or any part thereof upon or against the property or any part of said property described in plaintiff's said amended complaint, and no opportunity was ever given to defendant to be heard at any time as to any matter touching said pretended improvements or work or the alleged levy or assessment upon the said property thereof.

K. That the said former city of New Whatcom did not in any re-

spect comply with any of the provisions, terms, or conditions of said ordinance number 36 in the matters and things alleged and referred to in said amended complaint.

VIII.

And defendant further avers that the said former city of New Whatcom did not comply with any of the provisions, terms,
81 or conditions of the said ordinance number 20 referred to in said amended complaint in any of the matters and things alleged and referred to in said amended complaint.

IX.

Defendants further allege that the so-called and pretended assessments and levies are void because they do not purport to have been made and in fact, they were not made, in proportion to the benefits conferred upon the property claimed to have been assessed, and that in fact the said pretended assessments and levies are claimed to have been made for an arbitrary sum, irrespective of any benefits conferred; that said assessments and levies, if they were made at all, were made by charging each lot of 40 and 50 feet frontage and said unplatted lands with the exact alleged cost for the work and improvements made immediately in front of each said separate lot and tract to the centre of the street, and irrespective of the cost of the entire improvements, and irrespective of any benefits to the said lots or lands, the purpose being to charge each lot and tract with the cost of such work and improvements immediately in front thereof, as ascertained and computed by said city by its officers and agents, without any regard to equality, justness, or fairness, and without any regard to benefits, and without any regard to any apportionment of the entire cost of said improvements and work; that in fact the said pretended assessments so made were not uniform or equal or fair or just or lawful in any respect; that said Elk
82 street is 80 feet in width, and no part of said planking abuts upon said lots or lands or any part thereof; that neither said lots or lands or any part thereof were benefited by the said improvements in the sums alleged or in any sums whatever.

And for a second affirmative defense these defendants aver:

That neither they or any other persons ever petitioned the said city council or any other person for the said alleged work or improvements or any part or portion thereof to be made, and that these defendants were never given any opportunity to protest, remonstrate, or in any manner to be heard as to any of the matters and things in said amended complaint alleged or referred to, and that the said city council in all things touching said work and improvements, assessments, and levies acted wholly and entirely upon its own motion, and arbitrarily and unjustly, without the consent of these defendants or of any other owners of property abutting upon said portion of the said street.

For a further and separate defense to the alleged cause of action in plaintiff's said amended complaint these defendants aver that

the said amended complaint does not state facts sufficient to constitute a cause of action against these defendants or against their said real estate or any part or portion thereof.

83 And for a fourth and further separate defense these defendants aver—

That by reason of the facts, matters, and things herein stated by way of answer defendants aver that the said pretended assessments and levies and liens are all wholly void and of no force or effect.

That by reason of the facts, matters, and things herein stated by way of answer defendants aver that the said pretended assessments, levies, and liens are wholly void and of no force and effect.

Wherefore these defendants pray that said alleged cause of action be dismissed, together with their costs and disbursements in this behalf expended, and that the said pretended assessments be no lien upon and against defendants' said property, and may be decreed to be of no force or effect, and that the same be held for naught.

BLACK & LEAMING,
Attorneys for Defendants.

Service of copy of above answer acknowledged and verification waived.

J. R. CRITES.

(Endorsed on back:) 992. In the superior court of Whatcom county, State of Washington. City of New Whatcom, plaintiff, *vs.* E. F. G. Carlyon, J. E. Baker, and Olive E. Baker, defendants. Answer to amended complaint. Filed this 26th day of July, 1893. H. H. Peirce, clerk. Black & Leaming, attorneys for defendants.

84 PLAINTIFF'S EXHIBIT "I."

In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
E. F. G. CARLYON, J. E. BAKER, and OLIVE E. BAKER, Defendants. } No. 992. Reply.

Comes now the plaintiff and for reply to the answer of the defendants denies and alleges as follows:

I.

For reply to the allegations contained in the first affirmative defense of defendants this plaintiff denies the same and each and every part thereof.

II.

For reply to the allegations contained in the second affirmative defense of the defendants this plaintiff denies the same and each and every part thereof.

III.

For reply to the allegations contained in the "further and separate defense," on page 11 of said answer of defendants, this plaintiff denies the same and each and every part thereof.

85 IV.

For reply to the allegations contained in the "fourth and further separate defense" of defendants this plaintiff denies the same and each and every part thereof.

And for a further reply to the affirmative defense, as set out and alleged in said answer of defendants, the plaintiff alleges:

1.

That the defendants ought not to be permitted to allege or prove that the said former city of New Whatcom never settled with or offered to settle with said defendant- or any other owner of property abutting on said Elk street for damages which would be sustained or which were sustained by reason of the said improvements being made, for the reason, and plaintiff alleges, that said defendants stood by and permitted the said former city of New Whatcom to make said improvements and incur the expense thereof, and never objected or protested in any way or manner to the making of said improvements or the manner in which they were being made, although they were being made openly and in full sight of the defendants; that said defendants had full knowledge that said improvements were being made and of the manner in which they were being made, and made no objection thereto.

For a second and further reply to the affirmative defenses of defendants in said answer contained plaintiff alleges:

86 1.

That the defendants ought not to be permitted to allege or prove the matters and things set out and alleged in said affirmative defenses, for the reason that when said improvements were being made and up to the time the assessment was made and improvement accepted by said city the defendants stood by and witnessed the making of said improvements and did not object or protest in any manner against the expense being incurred by the plaintiff in the making of said improvement and did not object or protest in any manner against the making thereof, and that the defendants acquiesced in the same; that said defendants ought not to be permitted to allege or prove any irregularity in making said improvements, for the reason that the defendants consented to said improvements being made in the manner in which they were made.

And for a third and further reply to the affirmative defense of defendants in said answer contained plaintiff alleges:

1.

That the defendants ought not to be permitted to allege or prove the matters set out and alleged in said affirmative defenses, for the reason that when the city council of the former city of New Whatcom met as a board of equalization, as provided by ordinance No. 36, the defendants had full notice of said meeting, and that they failed to object to said assessment and the equalization of said
87 assessment; that the defendants failed to appear before the said board of equalization for the purpose of making any objections to the said improvements being made or the manner in which they were made, but consented to said improvement and the assessment as made by the former city of New Whatcom; that at said time the said defendants had full opportunity to have been heard upon all objections which they might have had to any or all of the proceedings in the making of said improvements and the making of the assessment to defray the cost thereof, as alleged in plaintiff's amended complaint; that by reason of their failure to so appear and make objection to said improvement and assessment, if any they had, they are now estopped from claiming that said improvements were not made, and that said assessments were not made, in strict conformity with the requirements of said ordinance No. 36, as alleged in plaintiff's amended complaint.

Wherefore plaintiff prays for the relief demanded in its complaint.

T. E. CADE AND
J. R. CRITES,
Plaintiff's Attorney.

STATE OF WASHINGTON, } ss:
County of Whatcom, }

T. E. Cade, being first duly sworn, on oath says that he is the attorney for the plaintiff in the above-entitled action, a duly organized and existing municipal corporation; that he has read the
88 above and foregoing reply and knows the contents thereof, and that he believes the same to be true.

T. E. CADE.

Subscribed and sworn to before me this 25th day of July, 1893.

D. W. FREEMAN,
Notary Public for State of Washington,
Residing at New Whatcom, in said State.

Copy rec'd July 25th, 1893.

Endorsed on back: 992. City of New Whatcom *vs.* E. F. G. Carlyon *et al.* Reply. Filed July 26th, 1893. H. H. Peirce, Co. clerk.

89 PLAINTIFF'S EXHIBIT "J."

In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
E. F. G. CARLYON, J. E. BAKER, and OLIVE E. BAKER, Defendants.

No. 992. Findings of Fact and Conclusions of Law.

This cause having come on regularly for trial upon the issues joined herein by the various pleadings on behalf of the plaintiff and defendant-, plaintiff appearing by its attorney-, T. E. Cade and J. R. Crites, and defendant- appearing by their attorneys, Black & Leaming, and the court, having heard the testimony offered and introduced, and having inspected the pleadings and exhibits filed and introduced in this cause, and now being fully advised in the premises, does make the following—

Findings of Fact.

1.

That on the 16th day of February, 1891, the plaintiff became the lawful successor of the former cities of Whatcom and New Whatcom, which were both municipal corporations theretofore ex-
90 isting under the laws of the Territory of Washington, and such successorship being by virtue of the consolidation of said cities under the name of the city of New Whatcom, and that said plaintiff has since been and now is a municipal corporation and city of the third class under the laws of the State of Washington.

2.

That the defendants J. E. Baker and Olive E. Baker are husband and wife.

3.

That the defendants are the owners of the following-described real estate, lying and being in the county of Whatcom, State of Washington, particularly described as follows:

Lot 22, in block 140, and lots 1, 29, 30, 31, 32, and 33, in block 143, in the First addition to New Whatcom, according to the plat thereof.

4.

That all of said lots abut on Elk street, between Elk street east and North street, which are all regularly platted and laid out streets, according to the plat of the First addition to New Whatcom.

5.

That on the 19th day of July, 1890, the council of the former city of New Whatcom, by resolution, ordered the improvement of Elk

street, between Elk street east and North street, by grading and leveling the same to the official grade, and that sidewalks
91 9 ft. in width be constructed on both sides of said street, and that said street be planked for ten feet on each side of the center thereof, and that the cost thereof should be assessed upon the lots and lands fronting upon said portion of said street so improved in proportion to the benefits to the same.

6.

That prior to the 19th day of July, 1890, the said portion of said street lying between the intersection with Elk street east and North street had never been graded, sidewalked, or cleared of stumps, and that the same was at said time wholly unimproved.

7.

That thereafter, in pursuance of an advertisement for bids, the said city council of said city duly let, on the 5th day of August, 1890, the contract for improving said portion of said street to W. G. Fleming and John Cosgrove, they being the lowest responsible bidders.

That after said work was completed and accepted the city council of said former city proceeded to apportion the expense of the work performed and attempted to levy the costs thereof against the various lots abutting upon said portion of said Elk street, and attempted to make an assessment for such cost upon the following lots, among others, in the sums below stated:

Lot 22, block 140	$134 50
Lot 1, block 143	131 25
Lot 29, block 143	48 48
Lot 30, block 143	34 58
Lot 31, block 143	33 60
Lot 32, block 143	32 15
Lot 33, block 143	32 10

92 8.

That on the 28th day of June, 1890, the said former city passed its ordinance No. 36, a copy of which was introduced in evidence and is marked "Plaintiff's Exhibit 'C.'"

9.

That on the 19th day of July, 1890, the city council of said former city of New Whatcom duly passed and adopted its ordinance No. 50, a copy of which was introduced in evidence and is marked Plaintiff's Exhibit —.

10.

That after said work was performed and said improvements made said former city, by its council, ascertained the exact cost of the work and improvements in front of each lot abutting upon said Elk street between its intersection with Elk street east and North street to the center of the street in front of the lots, and that said expense

was attempted to be charged to said lots as an assessment for the purpose of paying for said improvement; that each of said lots and tracts of land abutting on said portion of Elk street were attempted to be assessed by the said former city in the exact amount of the ascertained cost of said work and improvements in front of each lot to the center of the street, and that said city council in making said assessment did not make or attempt to make said assessment upon a basis of benefits to the property or any portion thereof.

And the court further finds as its conclusions of law:

93 1.

That said assessments were not made or apportioned in accordance with the benefits received by the property, but were made upon an arbitrary rule, irrespective of the benefits; that said assessments and all and each of them, so far as they appertain to the property of the defendants hereinbefore described, are void and illegal and the same should be set aside and held for naught, and that the defendants are entitled to a decree discharging the lien heretofore claimed by the plaintiff on the said property and decreeing said assessment to be invalid and illegal, and have judgment against the plaintiff for its costs and disbursements in this case.

Plaintiff, by its attorneys, hereby except- to each and every finding of fact and conclusion of law herein stated and the whole thereof for the reason that they and each and all of them are not sustained by the evidence in said cause and are contrary to the evidence in said cause; which exceptions are allowed by the court.

Done in open court this 13th day of January, 1894.

Defendants' attorneys pray exceptions to the findings of fact above set forth numbered, respectively, 2, 3, 4, 5, and 6, upon the ground that the same are not supported by the proofs in said action nor are either of them; which exceptions are by the court allowed.

JNO. R. WINN, *Judge.*

94 (Endorsed:) No. 992. Superior court, county of Whatcom. City of New Whatcom, plaintiff, *vs.* E. F. G. Carlyon *et al.*, defendant-. Findings and conclusions. Filed Jan. 13th, 1894. H. H. Peirce, clerk, by C. H. Hurlbut, deputy clerk.

PLAINTIFF'S EXHIBIT "K."

In the Superior Court of the State of Washington for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
vs.
E. F. G. CARLYON, J. E. BAKER, and OLIVE E. BAKER, Defendants.
} No. 992. Judgment.

This cause coming on for hearing upon the findings of fact and conclusions of law and upon the motion of defendants, it is by the court ordered, adjudged, and decreed that the complaint of the

plaintiff be, and the same hereby is, dismissed, and the defendants be, and are hereby, awarded judgment against the plaintiff for its costs, taxed in the sum of thirty & $\frac{10}{100}$ dollars.

95 All of which is finally ordered, adjudged, and decreed.

Entered this 13th day of January, A. D. 1894.

JNO. R. WINN,

Judge of the Superior Court, Whatcom County, Washington.

(Endorsed:) No. 992. Superior court, county of Whatcom. City of New Whatcom, plaintiff, *vs.* E. F. G. Carlyon *et al.*, defendant-. Judgment. Filed Jan. 13th, 1894. H. H. Peirce, clerk, by C. H. Hurlbut, deputy clerk.

PLAINTIFF'S EXHIBIT "L."

In the Supreme Court of the State of Washington, January Session, A. D. 1895.

Be it remembered that at a regular session of the supreme court of the State of Washington, begun and holden at Olympia on the 2nd Monday in Jan., A. D. 1895, it being the fourteenth day of said month, among other the following was had and done, to wit:

THURSDAY, *February 14th*, 1895.

CITY OF NEW WHATCOM, Appellant, *vs.* E. F. G. CARLYON *et al.*, Respondent-. } No. 1337. Judgment. Supreme Court. No. 992.

96 This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Whatcom county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 14th day of February, A. D. 1895, on motion of C. W. Dorr, Esquire, of counsel for respondent-, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed, with costs, the motion to retax costs denied, and that said E. F. G. Carlyon *et al.* have and recover from the said city of New Whatcom the costs of this action, taxed and allowed at forty-nine dollars; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the foregoing is a true copy of the judgment and decree in said cause as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Olympia, this 19th day of February, A. D. 1895.

C. S. REINHART,

[SEAL.] *Clerk of the Supreme Court, State of Washington.*

(Endorsed:) No. 992. City of New Whatcom, plaintiff, appellant, *vs.* E. F. G. Carlyon *et al.*, defendant-, respondent-. Remittitur. Filed March 9th, 1895. C. A. Puariea, clerk. H. H. Peirce, deputy.

97 EXHIBIT C.

Ordinance No. 301.

An ordinance providing the method of making, levying and collecting assessments for local improvements in the city of New Whatcom, Washington, by a new assessment, or reassessment, of the cost and expense of making the same, upon the property benefited thereby.

The city council of the city of New Whatcom do ordain as follows:

SECTION 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, regrading, paving, repaving, planking, replanking, sidewalking, bridging, macadamizing, remacadamizing, graveling, regraveling, piling, repiling, capping, recapping, any street, avenue, alley, or other public place, or for any local improvement, which has heretofore been made by the former cities of Whatcom or New Whatcom, or which has heretofore been made, or which may be hereafter made by the city of New Whatcom, has been or may be hereafter declared void and its enforcement, under the charter and laws governing said city of New Whatcom, refused by the courts of this State, or for any cause whatever has been heretofore or may be hereafter set aside annulled or declared void by any court, either directly or by virtue of any decision of such court, the city council shall designate the streets, alleys, avenues or other public places or parts thereof upon which such improvements have been done or made, the character, as near as may be, of the work or improvements that have been done or made thereon, and shall, by ordinance, order and make a new assessment or reassessment upon the blocks, lots or tracts of land which have been or will be benefited by such local improvement to the extent of their proportionate part of the cost expense and value thereof, and the same shall be assessed, levied and collected as in this ordinance set forth.

SEC. 2. When the city council of the city of New Whatcom shall have passed and adopted its ordinance designating the streets, alleys, avenues, or other public places or parts thereof, upon which said improvements have been done or made, and ordering a new assessment or reassessment of the cost thereof, upon the blocks, lots and parcels of land which have been or will be benefited by such local improvement, as provided by said ordinance, in section 1 of this ordinance described, the said district shall thereafter be known as "local improvement district No. —" which said district shall include all the property fronting on said street, alley, avenue, or other public place so improved, between the points named in said ordinance, to the distance back from such street, alley, avenue, or other public

place, if platted in blocks to the center of the block; if platted in lots only to the center of the lot, and if not platted to the distance of one hundred and twenty (120) feet.

SEC. 3. The city clerk of the city of New Whatcom, shall, within five days after the ordinance ordering the new assessment or re-assessment to be made has taken effect, prepare and file in his
98 office an assessment-roll for the assessment district designated in said ordinance for the improvement od said street, avenue, alley or other public place or part thereof, upon which assessment-roll, each block, lot or other smaller subdivision of real estate in such district situated shall be listed in the name of the owner if known, and if unknown it shall be listed as "unknown owner." The city clerk shall certify that said list is a true and correct list of all the property fronting on the street, avenue, alley or *or* other public place so improved, between the points named in the ordinance directing the reassessment, to the distance back from such street, avenue, alley or other public place, on that portion platted in blocks, to the center of the block; on that portion platted in lots only to the center of the lot, and on that portion not platted to the distance of one hundred and twenty feet. Such certificate shall be placed at the foot of the list and shall be sufficient if in the following form:

STATE OF WASHINGTON, } ss:
County of Whatcom, City of New Whatcom, }

I, —— ——, city clerk of the city of New Whatcom, State of Washington, do hereby certify that I did on the — day of ——, 189–, list each block, lot or tract of land set forth in the above and foregoing roll, and that the same is a true and correct list of all the blocks, lots or tracts of land situated within the limits of said assessment district, fronting or abutting on said street, alley, avenue or other public place so improved, to a distance back from such street, on that portion platted in blocks to the center of the block, on that portion platted in lots only to the center of the lot, and on that portion not platted to the distance of one hundred and twenty *feet* (120) feet.

Dated at New Whatcom, Wash., this — day of ——, 189–.

——— ——, *City Clerk.*

SEC. 4. The city council shall, after the city clerk has filed in his office the said assessment-roll with his certificate attached thereto as herein provided, at its first regular meeting, thereafter, unless laid over by the city council to a later meeting, proceed to ascertain the total expense of such work and improvement and the expense proportionately of all improvements in the space formed by the intersection of two or more streets, or where one street terminates in another, and of all necessary street crossings or cross-ways at corners or intersections of streets and the expense of establishing building and repairing bridges, and where any such street, avenue, alley or other public place constitutes the water front of said city, or bounded on one side by the property thereof, as well as the expense

of making such improvements in front of any property belonging to such city to the center line of such street, alley, avenue, or other public place. After ascertaining all the aforesaid items of expense the city council shall deduct the total amount thereof from the total cost of said improvement, and the remainder shall be the net expense to be assessed and levied upon the private property included in said assessment-roll and in such assessment district; provided that the city council may expend from the general fund for such purposes such sums as in their judgment may be fair and equitable in consideration of the benefits accruing to the general public by reason of such improvement. The city council shall cause the total expense, deductions and net expense chargeable to private
99 property to appear upon said assessment or reassessment roll in separate items. The city clerk shall attach his certificate to said roll certifying that the said items were duly ascertained by the city council, at a regular meeting, giving the date thereof, and that said assessment roll is the assessment-roll prepared by him. Such certificate shall be sufficient if in the following form:

STATE OF WASHINGTON, }
County of Whatcom, City of New Whatcom, } ss:

I, —— ——, city clerk of the city of New Whatcom, State of Washington, do hereby certify that the within roll is the assessment-roll prepared by me of local improvement district No. —, as required by section — of ordinance No. — of the ordinances of the city of New Whatcom, and that the true total expense, total deductions, and net expense chargeable to private property, as ascertained by the city council at a regular session thereof, held on the — day of ——, 189–, and each and every of them are truly shown within.

Dated the — day of ——, 189–.

—— ——, *City Clerk.*

SEC. 5. The assessment-roll shall be delivered by the city council to a committee of three (3) to be appointed from its members to examine the property designated therein. The committee or a majority thereof, shall examine the blocks, lots and tracts of land in said assessment district situated and described in such assessment-roll and shall correct the description of all the blocks, lots and tracts of land therein, if any errors be found. Said committee shall also ascertain and report in a separate column marked "Report of committee on said roll" the account of the full debt of each lot, block, or tract of land included in said assessment district, in proportion to the number of feet of such lands and lots fronting thereon and included in said improvement district, and in proportion to the benefits derived and received by or conferred upon said blocks, lots or tracts of land by such improvement. Said committee shall certify upon such roll, the date of such examination; that the same was fairly and justly made, and shall return the same to the city council. Such certificate shall be sufficient if in the following form:

STATE OF WASHINGTON, } ss:
County of Whatcom, City of New Whatcom, }

We, the committee appointed to examine the blocks, lots and tracts of land, and the public work or improvements included in local improvement district No. — and described in the within assessment-roll, do hereby certify that on the — day of ——, 189–, we duly examined the same, and find the full debt of each lot, block or tract of land named within to be the amount set opposite the description of each block, lot or tract of land within; that said amounts are in proportion to the number of feet of said blocks, lots or tracts of land fronting or abutting on said improvement, and included in the improvement district, and in proportion to the benefits derived or received by or conferred upon the said blocks, lots or tracts of land by said improvement, sufficient to cover the total expense of said work; that said examination was fairly and
100 justly made and is entered in the column marked "Report of committee" on the within roll.

Dated —— —, 1896.

—— ——, *City Clerk.*

SEC. 6. The city council on receiving and hearing the report of the committee shall order such assessment-roll filed in the city clerk's office, and shall fix a time, which shall not be less than ten days from and after the last publication of the notice hereinafter provided for, at which they will hear, consider and determine any and all objections to said assessment-roll, which have been filed, as hereinafter provided, by any party aggrieved.

SEC. 7. Upon receiving the assessment-roll from the city council, endorsed and certified by the committee, the city clerk shall immediately give notice by three successive publications in the official newspaper of the city of New Whatcom, that the assessment or reassessment roll providing for the levy of the expense of the improvement of (naming the streets, alleys, avenues or other public places so improved) is on file in his office; the date on which the same was filed, and shall state a time fixed by the city council as provided in section 6 of this ordinance (which shall not be less than ten days from and after the last publication of said notice), at which the city council will hear, consider and determine any and all objections to said assessment-roll by the parties aggrieved by said assessment. Said notice shall be sufficient if in the following form:

Notice.

Special levy of the expense of local improvement district No. — on (naming the streets, alleys, avenues, or other public place or parts thereof).

Notice is hereby given to all owners of property in the above-described local improvement district, and to all other persons whom it may concern, that the assessment or reassessment roll providing for the levy of the expense of — was filed in the office of the city

clerk of the city of New Whatcom, on the — day of ——, 189–, and that the same is now open to inspection; that on the — day of ——, 189–, at the hour of — at the city council-rooms, in the building known as the "city hall" in the city of New Whatcom, the city council will meet and hear, consider and determine any and all objections which have been filed to the regularity of the proceedings in making such assessment or reassessment, and to the amount to be assessed and levied upon each block, lot or tract of land for said improvement.

Dated at New Whatcom, Wash., this — day of ——, 189–.

—— ——, *City Clerk.*

The owner or owners of any property described in said assessment-roll, whether named therein or not, may, within ten (10) days from the date of the last publication of said notice file with the city clerk his, her or their objections, in writing, to the said assessment, or any other matter or thing in said assessment-roll contained.

SEC. 8. At the date fixed for such hearing the city council shall proceed to examine and consider said assessment-roll, as reported by the committee, and shall hear any and all objections filed by any party interested to the regularity of the proceedings in making such assessment or reassessment, or of the amount of such assessment or reassessment, or of the amount to be assessed or levied on any particular block, lot of tract or land, and shall fully hear and determine the same, and shall have power to adjourn said hearing from time to time, and may make such corrections as shall
101 be necessary or in their judgment shall be deemed just; and shall have full power to revise, correct, confirm, set aside, or to order that said assessment be made *de novo*, and shall, at said time, unless postponed by the city council, assess and levy upon each of said blocks, lots and tracts of land the net amount thus ascertained to be the full debt thereof, and in proportion to the number of feet of such lands and lots fronting thereon, and included in said improvement district, and in proportion to the benefits derived from said improvement, which said amounts shall be placed on said assessment-roll in a separate column marked "Final levy."

SEC. 9. After equalizing said assessment-roll, as provided in section seven of this ordinance, the city council shall pass and adopt its ordinance approving and confirming the proceedings in making such assessment or reassessment as corrected by them; and their decision and order shall be a final determination of the regularity, validity and correctness of said assessment or reassessment to the amount thereof levied on each block, lot or tract of land in said assessment district. When such assessment is completed all sums paid on the former attempted assessment shall be credited to the property on account of which the same was paid.

SEC. 10. Any person who has filed objections to such assessment or reassessment, as hereinbefore provided shall have the right to appeal to the superior court of the State of Washington, for the county of Whatcom, as provided by the laws of the State of Washington.

SEC. 11. Upon the adoption of the ordinance approving and confirming said assessment or reassessment, as provided in section nine (9) of this ordinance, a warrant of collection and certificate of levy shall be endorsed upon said roll, signed by the mayor and attested by the clerk of said city, and the same shall be delivered to the city treasurer for collection. Such warrant and certificate shall be sufficient, if in the following form:

To the treasurer of the city of New Whatcom:

At a session of the city council of the city of New Whatcom held on the — day of ——, 189–, after due notice having been given, as required by ordinance, the within assessment-roll was duly equalized and the amounts set forth in the within roll in the column marked "Final levy" were duly assessed and levied upon the blocks, lots and tracts of land written against the said amounts, and was duly confirmed by ordinance No. — of the city of New Whatcom and you, the city treasurer of the city of New Whatcom are hereby authorized, empowered and directed to collect the same.

Dated —— —, 189–.

—— ——, *Mayor.*

Attest: —— ——, *City Clerk.*

SEC. 12. The city treasurer shall receive said assessment-roll and shall file with the city clerk his receipt therefor, and the city clerk shall charge the treasurer with the total amount of the levy therein made on private property less such deductions as shall be made on said roll for payments made on previous assessments or attempted assessments, as provided in section nine (9) of this ordinance. The treasurer shall publish a notice in the official newspaper of the city of New Whatcom, that he has received such assessment-roll for collection, with the date of the final levy, and that unless the same is paid within thirty days from the date of the first publication of
102 such notice, the same will be declared delinquent, and said roll will be returned to the city clerk for further proceedings as provided by law. Such notice shall be published in three consecutive issues of said paper, and shall be sufficient, if in the following form:

Special Assessment.

Notice is hereby given that the assessment or reassessment roll showing the levy made by the city council on the — day of ——, 189–, upon the blocks, lots and tracts of land fronting and abutting on — and known as local improvement district No. — in said city has been delivered to me for collection and if not paid within thirty days from the date of the first publication of this notice the same will become delinquent and will be returned to the city clerk for further proceedings as required by law.

Dated —— —, 189–.

—— ——,
City Treasurer.

SEC. 13. At the expiration of said thirty days the treasurer shall return said assessment-roll to the city clerk, and shall at said time enter opposite the proper description, the words "not paid" in all cases where the assessment has not been paid in full. Said entry or return may be in the following form:

STATE OF WASHINGTON, }
County of Whatcom, City of New Whatcom, } ss:

I, —— ——, city treasurer of the city of New Whatcom, State of Washington, do hereby certify that I have made due and diligent effort to collect the amounts set forth in the within assessment-roll; that all sums marked not paid on said roll have not been paid; that I have collected on said assessment the sum of $— and no more, and that all of the blocks, lots and tracts of land marked "not paid" are now delinquent.

Dated —— —, 189–.

—— ——,
City Treasurer.

The clerk shall, after such return has been made and said roll delivered to him, credit the city treasurer with the amount of said roll remaining unpaid and returned as delinquent.

SEC. 14. After receiving the said assessment-roll, the city clerk shall immediately deliver the same to the city attorney, and shall take his receipt therefor. It shall be the duty of the city attorney, upon receiving the said assessment-roll to enforce the collection thereof, in the manner provided by law.

SEC. 15. All ordinances and parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

Passed by the city council of the city of New Whatcom, Washington, this 18th day of March, A. D. 1895.

Approved this 19th day of March, A. D. 1895.

ALFRED L. BLACK, *Mayor.*

Attest: J. K. APPLEBY, *City Clerk.*

I hereby certify that the foregoing is a true and correct copy of ordinance No. 301 of the ordinances of the city of New Whatcom, Washington, as passed by the city council and approved by the mayor, and that the same was published in the Daily Reveille, a newspaper printed and published in the city of New Whatcom, Washington, on the 12th day of February, 1896.

—— ——, *City Clerk.*

103 EXHIBIT D.

Ordinance No. 306.

An ordinance ordering and providing for a new assessment or reassessment upon the blocks, lots and parcels of land which have been or will be benefited by the improvement of Elk street, from its intersection with Elk street east, to North street in the city of New Whatcom, Washington, and designating and establishing local improvement district No. 8 "*b*."

Whereas, the city council of the former city of New Whatcom did on the 19th day of July, A. D. 1890, order that so much of Elk street in the city of New Whatcom, Washington, as lies between its intersection with Elk street east in said city, and the northerly line of North street, be graded and leveled to the official grade of said portion of Elk street, and that said portion of Elk street be planked for ten feet on each side of the center line thereof, and that a continuous line of sidewalk nine (9) feet wide shall be constructed on both sides of said portion of Elk street, and the expense thereof be and hereby is, assessed upon the lots and lands fronting upon that portion of said street so improved in proportion to the benefits to the same as such expense and benefits may be hereafter lawfully ascertained; and

Whereas, said (former) city of New Whatcom did thereafter advertise for bids for the work, labor and material necessary to make and complete said improvement, and

Whereas, said (former) city of New Whatcom did thereafter and on the 6th day of August, 1896, enter into a contract with W. G. Fleming & Co. (they being the lowest responsible bidders) for the work, labor and material necessary to make and complete said improvement, and

Whereas, said work and labor was thereafter performed and said material furnished by the said W. G. Fleming & Co., and
104 said improvement fully completed at a total cost of twelve thousand nine hundred sixty-eight and $\frac{80}{100}$ dollars $12,968.80 and the same was duly accepted by the said former city of New Whatcom, and

Whereas, said former city of New Whatcom did pay from its general fund of said city, the sum of one thousand eight hundred and fourteen and $\frac{63}{100}$ dollars for improvements at the corners and intersections of said streets, and

Whereas, the city council of the former city of New Whatcom did thereafter levy an assessment upon the lots and tracts of land fronting and abutting on said portion of Elk street so improved to pay the cost and expense of such improvement, after deducting the payments made by the city from its general fund as aforesaid, and

Whereas, the present city of New Whatcom, on the 16th day of February, 1891, became the lawful successor of the former city of New Whatcom, said successorship being by virtue of the consolida-

tion of the former cities of Whatcom and New Whatcom into one municipal corporation by the name of "the city of New Whatcom," and

Whereas, said assessment heretofore levied by said former city of New Whatcom, to pay the cost of such improvement, has been heretofore set aside, annulled, declared void, and its enforcement refused by the courts of this State, and

Whereas, said improvement is of great benefit to the property abutting on said portion of said street so improved, now, therefore, the city council of the city of New Whatcom do ordain as follows:

SECTION 1. That a new assessment or reassessment of the cost and expense of the improvement of that portion of Elk street, be-
105 tween its intersection with Elk street east and the northerly side of North street in said city of New Whatcom, Washington, as aforesaid, is hereby ordered and made upon the blocks, lots and parcels of land which have been or will be benefited by such improvement to the extent of their proportionate part of the cost, expense and value thereof, and in case the cost of such improvement shall have been found to exceed the actual value thereof at the time of its completion, then, in that case, said new assessment shall be for, and based upon the actual value of such improvement, at the time of its completion.

SEC. 2. That that portion of Elk street so improved with the blocks, lots and parcels of land fronting and abutting thereon to a distance back from such street, where platted into blocks, to the center of each block, and where not platted to a distance back from such street of one hundred and twenty (120) feet be and the same is hereby established into and shall hereafter be known and described as "local improvement district No. 8 '*b*'" and the real estate situated within the limits of said improvement district, and none other, is and is hereby declared to be the property benefited by such improvement.

SEC. 3. The city clerk of said city of New Whatcom, is hereby ordered to prepare and report to the city council an assessment-roll for said improvement district, within five days from the date upon which this ordinance shall take effect, and the other proper officials of said city are hereby ordered and directed to take such steps as are necessary under the charter and ordinances governing said city to fully carry out the provisions of this ordinance.

Passed by the city council of the city of New Whatcom, Washington, this 10th day of June, 1895.

Approved by me this 11th day of June, 1895.

ALFRED L. BLACK, *Mayor.*

Attest: J. K. APPLEBY, *City Clerk.*

106 I, J. K. Appleby, city clerk of the city of New Whatcom, Washington, do hereby certify that the foregoing is a true and correct copy of ordinance No. 306 of the ordinances of the city of New Whatcom, Washington, as passed by the city council and approved by the mayor, and that the same was published in the "Daily

Reveille," a newspaper printed and published in the city of New Whatcom, Washington, on the 18th day of June, A. D. 1895.

—— ——, *City Clerk.*

107 EXHIBIT B.

Ordinance No. 310.

An ordinance approving and confirming the proceedings in making the assessment or reassessment, and the assessment or reassessment upon the blocks, lots and parcels of land which have been or will be benefited by the improvement of Elk street, from its intersection with Elk street east to North street, in the city of New Whatcom, Washington.

Whereas, the city council of the city of New Whatcom, Washington, did, on the 10th day of June, 1895, duly pass and adopt its ordinance No. 306, which said ordinance was entitled: "An ordinance ordering and providing for a new assessment or reassessment upon the blocks, lots and parcels of land which have been or will be benefited by the improvement of Elk street, from its intersection with Elk street east to North street, in the city of New Whatcom, Washington, and designating and establishing local improvement district No. 8 '*b*'" which said ordinance was approved June 11th, 1895, and published June 18th, 1895, and

Whereas, the city clerk of said city of New Whatcom did on the 24th day of June, 1895, prepare an assessment-roll for the district described in said ordinance No. 306, and

Whereas, the total cost of said improvement was found to be the sum of $12,768.80; that the city's portion of the expense of improving said street was $1,814.63, and that the net expense chargeable to private property was the sum of $11,154.17, which said sum was found to be the value of said improvement to said private property, at the time of the completion thereof, and

Whereas, said assessment-roll was on the 24th day of June, 189–, delivered by the city council to a committee of three appointed
108 from its members to examine the property and improvement and report the full debt of each block, lot or tract of land for said improvement, and

Whereas, said *counties* thereafter duly and regularly performed the duties required, and on the 8th day of July, 1895, returned said assessment-roll with their report endorsed thereon to the city council of said city, and

Whereas, said city council did on the 8th day of July, 1895, order said assessment-roll filed in the office of the city clerk and fixed Monday July 22nd, 1895, at 7.30 p. m. as a time at which they would hear, consider and determine any and all objections to the regularity of the proceedings in making such assessment, or to the amount to be assessed upon any block, lot or tract of land for said improvement, and

Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to wit: The Daily Reveille, in

three consecutive issues thereof, the same being the issues of July 9th, 10th and 11th, 1895, and

Whereas, said city council did meet as set forth in said notice and did at said time hear, consider and determine any and all objections which had been filed touching the regularity of the proceedings in making such assessment or reassessment and the amount to be assessed upon any block, lot or tract of land for said improvement, and did, at said time, assess and levy upon each block, lot or tract of land in said assessment-roll described, the net amount thus ascertained to be the full debt thereof, and caused the same to be placed on said roll, in a separate column marked "Final levy"

Now therefore, the city council of the city of New Whatcom
109 do ordain as follows:

SECTION 1. That the proceedings in making the assessment or reassessment, and the said assessment or reassessment, upon the blocks, lots and tracts of land in local improvement district No. 8 "*b*" for the improvement of Elk street from its intersection with Elk street east to North street, in said city of New Whatcom, be, and the same is hereby approved, ratified and confirmed.

SEC. 2. The mayor and city clerk of said city of New Whatcom are hereby authorized and empowered to indorse upon said assessment-roll, when this ordinance shall have taken effect a "certificate of levy" and "warrant of collection" and deliver the same to the city treasurer for collection.

Passed by the city council of the city of New Whatcom this 5th day of August, 1895.

Approved this the 7th day of Aug. A. D. 1895.

ALFRED L. BLACK, *Mayor.*

Attest: J. K. APPLEBY, *City Clerk.*

I, J. K. Appleby, city clerk of the city of New Whatcom, Washington, do hereby certify that the foregoing is a true and correct copy of ordinance No. 310 of the ordinances of the city of New Whatcom, Washington, as passed by the city council and approved by the mayor, and that the same was published in the "Daily Reveille," a newspaper printed and published in the city of New Whatcom, Washington, on the 10th day of August, A. D. 1895.

—— ——, *City Clerk.*

(Here follow assessment-rolls marked pp. 110 to 117.)

VAN WYCK, *City Treasurer.*

118 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
v.
BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Stipulation.

We do hereby stipulate and agree that the judge of the above-entitled court may settle and certify the foregoing statement of facts without any formalities, all notice being hereby waived; and we do further stipulate and agree that the foregoing statement of facts is a full, true, and correct statement of facts in this cause.

Dated at New Whatcom, Washington, this the 19th day of Sept., A. D. 1896.

T. E. CADE,
Attorneys for Plaintiff.
NEWMAN & HOWARD,
Attorneys for Defendant.

119 In the Superior Court of the State of Washington in and for the County of Whatcom.

THE CITY OF NEW WHATCOM, Plaintiff,
v.
BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, Defendant. } No. 4667.

Judge's Certificate.

I, John R. Winn, do hereby certify as follows:

1st. That I am the judge of the superior court of Whatcom county, State of Washington, and the judge who presided at and rendered the final decree therein in the above-entitled cause, being the case of The City of New Whatcom *vs.* Bellingham Bay & British Columbia Railroad Company and being numbered 4667 of this court.

2nd. That the matters embodied in the foregoing statement of facts are the matters and proceedings occurring in said cause, *nad* that the same are hereby made a part of the record therein; and I further certify that the same contains all the material facts, matters, and proceedings heretofore occurring in said cause and not already a part of the record therein, including all testimony, exhibits admitted, and other written evidences on file in said cause.

3rd. That this certificate is signed by me as the judge of said court in open court, the same being so signed in the presence of T. E. Cade, one of the attorneys for the plaintiff, and Newman & Howard,

attorneys for defendant, and pursuant to the stipulation and with the consent of said attorneys.

Dated this the 19th day of September, A. D. 1896.

JOHN R. WINN,
Judge of said Court.

120 No. 4667. Filed Sept. 19, 1896. C. A. Puariea, clerk, by Geo. C. Fisher, deputy.

121 THE CITY OF NEW WHATCOM, Respondent, *vs.* BELLINGHAM BAY IMPROVEMENT COMPANY, Appellant. } No. 2362. Filed Dec. 8th, 1896.

This is a consolidated action of a number of suits presenting similar questions brought by plaintiff against the defendant to foreclose liens for street assessments under the provisions of the act (Laws 1893, p. 226) authorizing the reassessment of costs of local improvements. Plaintiff had judgment and the defendant has appealed.

Some of the findings of fact are excepted to on the ground that they are not supported by or are contrary to the evidence. These findings relate to the ordering of the improvements, letting of the contract, execution of the work, the attempt to levy an assessment therefor according to benefits, and that it had been rendered ineffectual by a decision of the supreme court, the making of the reassessment, the amount due from the defendant, and its non-payment and delinquency.

It is contended that there was no evidence to support the findings with reference to the first assessment upon which the reassessment is based. The record shows that the original assessment-roll, the pleadings, findings, and judgment of the superior court, and the judgment of this court whereby said assessment was held ineffectual and void were introduced in evidence, and this was sufficient, *prima facie* at least, to support said findings.

See Town of Elma *vs.* Carney, 4 Wash., 418.

The other findings questioned involve, first, the sufficiency of the notice given appellant of the reassessment. The act, sec. 4, provides that such notice shall be given by three successive publications in the official newspaper of the city or town where such assessment-roll is on file; that it shall contain the date when it was filed and state a time at which the council will hear and consider objections
122 to the roll, and provision is made for the filing of objections at any time within ten days from the last publication of the notice.

It is conceded that notice by publication is sufficient, but the objection urged is that the time prescribed is so short as not to constitute due process of law, and many cases are cited by both sides upon this much-litigated question. It is well settled that the legislature has power primarily to prescribe the kind of notice to be given, although it cannot dispense with all notice, and it has also been

held that where a notice is not prescribed, if a reasonable notice is in fact given, that is sufficient.

Paulsen *vs.* City of Portland, 13 Supreme Court Rep., 750.
Williams *vs.* Mayor, 2 Mich., 560.
Gatch *vs.* City of Des Moines, 63 Ia., 718.
B. & O. R. R. Co. *vs.* P., W. & Ky. R. R. Co., 17 W. Va., 812.
Hagar *vs.* Reclamation Dist., 111 U. S., 701.
See also, as bearing upon this act, Frederick *vs.* City of Seattle, 13 Wash., 428.

We are of the opinion, under the authorities, that it should not be held that the notice prescribed in the act, which it is conceded was given, did not constitute due process of law as applied to the facts of this case. It appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed. The notice of the filing of the assessment-roll, while it fixed a time within which objections might be filed, was not in fact the only notice of the proceedings. The proceedings to reassess the property had been pending for some time. The reassessment could be had only by ordinance, and the ordinance had to be published in the official newspaper, and it appears that the ordinance providing for this reassessment was duly passed and published. It set forth in substance the facts relating to the first assessment.

Appellant was in a sense a party to the entire proceedings from the beginning, and, although this would not dispense with notice of the reassessment, it should have some bearing in determin-
123 ing the sufficiency of the notice given in considering the length of time allowed for filing objections.

Appellant contends that the court erred in striking portions of appellant's answer, whereby appellant sought to attack the validity of the assessment on the ground of its not having been made according to benefits, but as the appellant did not appear and file any objections against the proposed assessment after ample opportunity to do so, we think it was not entitled to offer proof to contest the same in the foreclosure suit on that ground, and that the paragraphs in question were properly stricken. Of course, it must appear that the assessment was according to benefits. Session Laws 1893, p. 227. And section 5, p. 160, provides:

"That the cost and expense thereof shall be taxed and assessed upon all the property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, and included in said improvement district, and in proportion to the benefits derived by said improvement."

While the language here may be somewhat involved, it is apparent that the controlling idea is that the assessment must be according to benefits, at the same time having reference to the frontage of the lots. In this case the council found that the property was equally benefited in proportion to its frontage, and while in fact the

assessment under that finding was made according to the front foot, it was also made according to benefits.

It is contended that the court erred in admitting certain ordinances in evidence on the ground that they were not competent proof of the facts therein recited. However this may be, it is not apparent that the court attached any weight to them as proof of the facts recited and as a *prima facie* case to support the findings, and judgment was made by the production of the assessment-roll and the records of the previous action, and, as there was no contradictory proof, there was no harmful error in this respect in admitting them.

It is further contended that the court erred in taxing an item of costs for copies of ordinances introduced in evidence on the
124 ground that the originals must be produced or an inability to produce them shown before certified copies could be offered and the other party burdened with costs to that extent if the decision should go against it. It would be most inconvenient to require the production of original ordinances in actions of this kind and keep them tied up in court pending the determination of the case, and it was proper to use certified copies instead. These ordinances were matters of public record and were duly pleaded, and proof of them was rendered necessary in consequence of the issues raised by the defendant. Ordinarily production and proof of such ordinances is not rendered necessary by the pleadings, but the appellant, having denied their existence, has no meritorious ground of complaining as to the manner of proving them.

It is also contended that the court erred in providing in the decree that the city might purchase the lands at the foreclosure sale. Its charter authorizes it to purchase, lease, receive, hold, and enjoy real and personal property and to control and dispose of the same for the public benefit, and the legislature has recognized the right of any municipal corporation to bid in property, in default of other bidders, when sold for special assessments. Laws 1893, p. 379, sec. 122. It would certainly be a hardship if, in the absence of other purchasers, the city was not authorized to bid up to the extent of the charge against the property. The liens must be foreclosed by an action in court, and this should not be rendered ineffectual in consequence of an inability to sell the land if there should be no other bidders. Affirmed.

SCOTT, *J.*

We concur:
ANDERS, *J.*
DUNBAR, *J.*
GORDON, *J.*

125 CITY OF NEW WHATCOM, Respondent,
v.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Appellant.
No. 2361. Filed December 8th, 1896.

Per CURIAM:

The facts presented in this case are similar to those in the cases between the city and the Bellingham Bay Improvement Company, recently decided, with the exception that the defendant contends that a railroad track cannot be assessed for benefits in making street improvements, and a number of authorities have been cited upon this proposition by both parties; but the statute upon which this proceeding was had provides "that all property benefited by the improvement shall be assessed to the extent of its proportionate part of the expense thereof." Laws of 1893, page 227, §§ 1 & 2.

It is not within our province to say that a railroad track and right of way cannot be benefited under any circumstances by the construction of street improvements, and as it may have been benefited in this instance, and the defendant did not appear and object to the assessment, we think the judgment should be affirmed.

126 In the Supreme Court, State of Washington.

THURSDAY, *Jan. 7th*, 1897.

CITY OF NEW WHATCOM, Respondent,
vs.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Appellant.
No. 2361. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Whatcom county and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 7th day of January, A. D. 1897, on motion of D. W. Freeman, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, the petition for rehearing denied, and that the said city of New Whatcom have and recover of and from the said Bellingham Bay and British Columbia Railroad Company and from Edward Fischer, surety, the costs of this action, taxed and allowed at fifty-eight dollars, and that execution issue therefore; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

127 In the Supreme Court of the State of Washington.

CITY OF NEW WHATCOM, Respondent,
vs.
BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, Appellant. } No. 2361.

Petition for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Washington.

To the honorable chief justice of the supreme court of the State of Washington:

The petition of The Bellingham Bay & British Columbia Railroad Company, appellant, respectfully shows to this honorable court as follows:

1st. Your petitioner is a corporation duly and legally incorporated under the laws of the State of California.

2nd. The City of New Whatcom, respondent, is a municipal corporation or city of the third class, organized and existing under and by virtue of the laws of the State of Washington.

3rd. The respondent filed a complaint in the superior court of the State of Washington for the county of Whatcom against appellant to declare and foreclose a lien on certain real estate belonging to the appellant and comprising a part of its right of way in the city of New Whatcom in the amount of two hundred and twenty-one dollars, with interest and costs, the same being adjudged to be the total amount of benefits derived or received by said property from certain street improvements in said city assessed and reassessed thereon.

4th. The appellant filed an answer and amended answer to said complaint in the court aforesaid, in the sixth affirmative defense of which amended answer, among other things, the following averments were made:

128 "2nd. That at all times in said complaint mentioned and since the year 1889 and prior thereto the defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and both prior and since said time defendant has been and is authorized to transact business in the State of Washington, and that during said time the defendant's principal office and place of business, together with the residence of its managing officers, has been and now is within the limits of the present City of New Whatcom, the plaintiff herein, and its predecessors, the cities of New Whatcom and Sehome, the territories of which last-named cities, about February 16th, 1891, were by consolidation with the city of Whatcom embraced and included within the limits of the present City of New Whatcom, the plaintiff herein.

"3rd. That the defendant and none of its officers and agents were ever served with or in any manner given personal notice or any notice whatever of any of the proceedings had or taken by the plaintiff city in the matter of said alleged reassessment or of any of the matters set out in the plaintiff's said complaint, and *was* never at

any time given personal notice or any notice of the alleged meeting, or of the time and place thereof, held by any council of plaintiff city, as alleged in paragraph ten of said complaint, except — in the next paragraph hereof set forth.

"4th. That the only notice of any kind or nature ever given by plaintiff city of any of the matters or proceedings alleged in plaintiff's said complaint relative to the said pretended reassessment was and is an alleged notice printed in the issues of the Daily Reveille, the official paper of said city, plaintiff, issued July 9th and 10th and 11th, in the year 1895, respectively; which said notice is in words and figures as follows, to wit:

Notice.

Special levy of the expense of local improvement district No. "8 B" on Elk street from its intersection with Elk street east to North St.

Notice is hereby given to all owners of property in the above-described local improvement district and to all other persons whom it may concern that the assessment or reassessment roll providing for the levy of the expense of grading and leveling said portion of Elk St. above described to the official grade thereof; of planking said portion of Elk St. above described for ten (10) feet on each side of the center line thereof, and of constructing a continuous line of sidewalk nine (9) feet wide upon both sides of said portion of said street above described was filed in the office of the city clerk on the 8th day of July, 1895, and that the same is now open to inspection; that on Monday, the 22nd day of July, 1895, at 7.30 p. m., at the city council rooms, in the building known as the "city hall," in the city of New Whatcom, the city council will meet and hear, consider, and determine any and all objections which have been filed to the regularity of the proceedings in making such assessment or reassessment and to the amount to be assessed and levied upon each block, lot, or tract of land for said improvement.

Dated at New Whatcom, Wash., July 9th, 1895.

J. K. APPLEBY, *City Clerk.*'

"5th. That said notice is not such notice as is required by said statute and is vague and uncertain, and is neither addressed to the defendant or any other property-owner by name, nor does the same contain any property description whatever, and especially fails to describe any of the property mentioned in the plaintiff's said complaint.

"6th. That said printed notice or any printed notice or any notice whatsoever, other than actual personal notice to defendant, is
129 insufficient, illegal, and of no effect.

"7th. That the defendant never petitioned for nor consented to said improvement, and never appeared before the council of the plaintiff city relative to said alleged reassessment, and never filed with the city clerk thereof any objection in writing thereto.

"10th. That by reason of the premises and of said proceedings had by plaintiff and set out in its said complaint defendant is im-

paired in the rights secured by it under the constitution of the State of Washington, and especially under article 1, sections 3 & 16, thereof, and of the Constitution of the United States, and especially amendments 5 & 14 thereof."

5th. The respondent filed in the court aforesaid a motion to strike all of the paragraphs last aforesaid from the sixth affirmative defense of appellant's amended answer, for the reason that the matters and things therein alleged were sham, frivolous, and no defense to said action, and the said court sustained the said motion; to which the appellant herein duly excepted at the time, and thereafter said court did find that due and legal notice was given of the time and place of the meeting of the city council of said city for hearing and considering objections to the regularity of the assessment and reassessment proceedings; to which the appellant duly excepted at the time.

6th. In the superior court aforesaid, upon trial had and evidence adduced, the court declared a lien on the said property of the appellant in the total amount of $221.00 and interest thereon at 7% per annum from September 23rd, 1895, together with costs, taxed at $33.10, and adjudged and decreed that such lien upon and against the property of appellant aforesaid should be and was foreclosed, and that such property should be sold by the sheriff of the county, pursuant to the statutes in such cases made and provided, and the proceeds of such sale should be applied to the payment of such lien, costs, and interest. It was also further ordered, adjudged, and decreed that the plaintiff in the case, the respondent in this court, might become a purchaser at such sale and be let into the immediate possession of the premises; to all of which the defendant in the case, the appellant herein, asked and was allowed exceptions at the time.

7th. Thereupon the plaintiff appealed the case to the supreme court of the State of Washington, where such proceedings were had that thereafter, to wit, January 7th, 1897, that court ordered and adjudged that the petition for rehearing be denied; that the judgment of the said superior court should be and was affirmed with costs, and that the appellant should pay to the respondent the costs of the action, taxed at $58.00; and it was further ordered that the cause be remitted to the said superior court for further proceedings in accordance with the opinion filed therein.

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8th. The main contention in the case aforesaid in the supreme court of the State of Washington was that the period of publication of the notice hereinbefore quoted and the time given for appearance were so unreasonably short as not to constitute due process of law within the meaning of the Constitution of the United States. This contention was presented and urged in twelve pages of the original printed brief filed by the appellant and four pages of the reply brief filed by appellant, as well as by oral argument made before the court by attorneys for appellant. These arguments were controverted in the printed brief filed by respondent and in oral argument made by attorneys for respondent, and the supreme court

of the State of Washington held that the notice given as aforesaid was due and lawful process.

Section 4 of the reassessment act (Session Laws 1893, p. 226) is as follows:

"On receiving the said reassessment-roll the clerk of such city or town shall give notice by three successive publications in the official newspaper of such city or town that such assessment-roll is on file in his office, the date of the filing of the same, and said notice shall state a time at which the council will hear and consider objections to said assessment-roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment-roll, whether named or not in such roll, may, within ten (10) days from the last publication provided therein, file with the clerk his objection, in writing, to said assessment."

The only notice given was a notice published for three successive days in a daily newspaper, as hereinbefore stated.

9th. The appellant is advised by counsel that in their opinion the said superior court erred in sustaining the motion to strike the sixth affirmative defense of appellant's amended answer and the
131 paragraphs thereof heretofore set forth, and that said court further erred in finding that the notice given constituted due process of law within the meaning of the Constitution of the United States, and the said court further erred in its conclusions of law and in rendering judgment against this appellant, and that the supreme court of Washington erred in affirming the judgment of the said superior court.

Wherefore your petitioner prays for an order directing the issuance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington and an order staying all further proceedings in said case upon the terms and conditions by law in such case made and provided, and that other suitable relief may be granted.

And your petitioner will ever pray.

BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY.
NEWMAN & HOWARD, *Attorneys for Appellant.*

STATE OF WASHINGTON, } ss:
County of Thurston, }

I, C. W. Howard, being first duly sworn, on oath say that I am one of the attorneys of record of The Bellingham Bay and British Columbia Railroad Company, appellant in the above-entitled action; that I have heard read the foregoing petition for writ of error, know the contents thereof, and believe the same to be true; that I make this affidavit for the reason that neither said company nor any of its officers are in Thurston county, Washington, and are absent from said county and non-residents of said county.

C. W. HOWARD.

Subscribed and sworn to before me by C. W. Howard this 27th day of February, A. D. 1897.

C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

Indorsed: In the supreme court, State of Washington. City of New Whatcom, respondent, *vs.* Bellingham Bay and British Columbia Railroad Company, appellant. Petition for a writ of error. Filed Feb. 27, 1897. C. S. Reinhart, clerk.

132 In the Supreme Court of the State of Washington.

CITY OF NEW WHATCOM, Respondent,
v.
BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Appellant.

No. 2361. Order Allowing Writ of Error.

The Bellingham Bay and British Columbia Railroad Company, the above-named appellant in this court, having this day filed its petition in writing to the hon. chief justice of the supreme court of the State of Washington for the allowance of a writ error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States the judgment of this court in the above-entitled cause, rendered and entered herein under date of the 7th day of January, A. D. 1897, and for an order fixing the amount of the security to be filed that the plaintiff in error, said Bellingham Bay and British Columbia R. R. Co., shall prosecute its said writ of error to effect and if it fail to make its plea good shall answer all damages and costs thereon in the Supreme Court of the United States, and for the allowance of a citation upon the filing of such writ of error in this court, and upon the approval and filing of such surety in pursuance of the statute in such case made and provided, and the undersigned having duly considered said matter and being fully advised in the premises:

Now, on motion of the said appellant's attorneys, it is ordered that said writ be, and the same is hereby, allowed, and that the amount of surety to be given as aforesaid be, and the same is hereby, fixed at the sum of eight hundred dollars ($800), and that such surety be conditioned that the plaintiff in error, said Bellingham Bay & British Columbia R. R. Co., shall prosecute said writ to effect and answer all damages and costs if it fail to make said plea good, and that the form of such surety and the sureties thereon be approved before filing the same by the undersigned, the chief justice of this court, and that upon the issuing and filing of said writ of error and the approving and filing of such surety, as aforesaid,
133 said writ of error shall be in full force and effect and shall operate as a supersedeas, and that a citation issue thereupon to the adverse party, to wit, The City of New Whatcom, in pursuance of the statute of the United States in such case made and provided.

Done at Olympia, in the State of Washington, this 27th day of February, A. D. 1897.

ELMON SCOTT,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: In supreme court of the State of Washington. City of New Whatcom, respondent, *vs.* Bellingham Bay & British Columbia Railroad Company, appellant. Order allowing writ of error. Filed Feb. 27, 1897. C. S. Reinhart, clerk. Newman & Howard, attorneys for appellant.

134 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Bellingham Bay and British Columbia Railroad Company, appellant, and The City of New Whatcom, respondent, No. 2361, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and
135 speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, District of Washington, Northern Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington,
By R. M. HOPKINS,
Deputy Clerk.

Allowed by—

ELMON SCOTT,
Chief Justice Supreme Court, State of Washington.

136 [Endorsed:] 2361. In the supreme court, State of Washington. City of New Whatcom, respondent and defendant in error, *vs.* Bellingham Bay and British Columbia Railroad Company, appellant & plaintiff in error. Writ of error. Filed & copy deposited this Mar. 2d, 1897. C. S. Reinhart, clerk. Newman & Howard, attorneys for appellant.

137 *Supersedeas Bond.*

Know all men by these presents that we, the Bellingham Bay and British Columbia Railroad Company, as principal, and Jacob Furth and E. C. Neufelder, as sureties, are held and firmly bound unto the City of New Whatcom, in the State of Washington, in the full and just sum of eight hundred dollars ($800.00), to be paid to the said City of New Whatcom, its successors, attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the second day of March, A. D. 1897.

Whereas lately, at a session of the supreme court of the State of Washington, in a suit pending in said court between the said Bellingham Bay and British Columbia Railroad Company and the said City of New Whatcom, and numbered in said court 2361, a judgment was rendered against the said Bellingham Bay and British Columbia Railroad Company and in favor of said City of New Whatcom, and the said Bellingham Bay and British Columbia Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of New Whatcom, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said Bellingham Bay and British Columbia Railroad Company shall prosecute said writ to effect and answer all damages and costs if it

fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, [SEAL.]
By NEWMAN & HOWARD, *Its Attorneys.* [SEAL.]
JACOB FURTH. [SEAL.]
E. C. NEUFELDER. [SEAL.]

138 Sealed and delivered in presence of—
H. J. RAMSEY.
MAURICE McMICKEN.

STATE OF WASHINGTON, } ss:
County of King, }

Jacob Furth and E. C. Neufelder, being duly sworn, on oath each for himself says that he is surety on the foregoing bond; that he is worth double the amount for which he became surety upon said bond, over and above all just debts and liabilities, in property situated within the State of Washington not exempt from execution.

JACOB FURTH.
E. C. NEUFELDER.

Subscribed and sworn to by Jacob Furth and E. C. Neufelder before me this second day of March, 1897.

[SEAL.] H. J. RAMSEY,
Notary Public in and for the State of Washington,
Residing at the City of Seattle.

Approved as a supersedeas bond by—
ELMON SCOTT,
Chief Justice of the State of Washington.

Indorsed: 2361. In the supreme court, State of Washington. City of New Whatcom, respondent and defendant in error, *vs.* Bellingham Bay and British Columbia Railroad Company, appellant & plaintiff in error. Supersedeas bond. Filed Mar. 2, 1897. C. S. Reinhart, clerk. Newman & Howard, attorneys for appellant.

139 UNITED STATES OF AMERICA, ss:

To the City of New Whatcom, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Washington in a cause numbered in said last-named court number 2361, wherein The Bellingham Bay and British Columbia Railroad Company is appellant and plaintiff in error and you are respondent and defendant in error, to show cause, if any there be, why the judgment rendered against the said appellant and plaintiff in error, as in the said writ

of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elmon Scott, chief justice of the supreme court of the State of Washington, this 2nd day of March, A. D. 1897.

[Seal of the Supreme Court, State of Washington.]

ELMON SCOTT,
Chief Justice of the Supreme Court of the State of Washington.

Attest my hand and the seal of said court this 2d day of March, A. D. 1897.

C. S. REINHART, *Clerk.*

Service of the above is hereby accepted this 4th day of March, A. D. 1897.

J. J. WEISENBURGER,
Mayor City of New Whatcom.

Copy of the above received this 4th day of March, 1897.

T. E. CADE AND
KERR AND McCORD,
D. W. FREEMAN,
Attorneys for the City of New Whatcom.

140 STATE OF WASHINGTON, } ss.:
County of Whatcom, }

C. W. Howard, being first duly sworn, upon oath says that he is a resident of the county of Whatcom, State of Washington, and is by profession an attorney-at-law; that on the 4th day of March, A. D. 1897, at the city of New Whatcom, Whatcom county, State of Washington, he did serve a full, true, and correct copy of the attached and foregoing citation, signed by the Hon. Elmon Scott, chief justice of the supreme court of the State of Washington, sued out by The Bellingham Bay & British Columbia Railroad Company, plaintiff in error, to review the judgment of the supreme court of the State of Washington in the action mentioned in said citation, on J. J. Weisenberger, mayor of The City of New Whatcom, the defendant in error, and did further serve, on the said 4th day of March, 1897, on T. E. Cade, D. W. Freeman, and Kerr & McCord, attorneys for the said City of New Whatcom, defendant in error, said citation by delivering a full, true, and correct copy of the same to the said J. J. Weisenberger, T. E. Cade, D. W. Freeman, and Kerr & McCord, each of which services appear by acknowledgement on the foregoing citation.

C. W. HOWARD.

Subscribed and sworn to by C. W. Howard before me this the 4th day of March, A. D. 1897.

{ Seal of Lin H. Hadley, Notary Public, State of Washington. Commission Expires Dec. 14, 1900. }

LIN H. HADLEY,
Notary Public in and for the State of Washington, Residing at New Whatcom.

141 [Endorsed:] 2361. In supreme court, State of Washington. City of New Whatcom, respondent and defendant in error, *vs.* Bellingham Bay and British Columbia Railroad Company, appellant and plaintiff in error. Citation and proof of service. Filed Mar. 10, 1897. C. S. Reinhart, clerk. Newman & Howard, attorneys for appellant.

142 In the Supreme Court of the United States.

BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, Plaintiff in Error,
vs.
CITY OF NEW WHATCOM, Defendant in Error.

No. 2361.
Assignment of Errors.

Of October term, in the year of our Lord one thousand eight hundred and ninety-six.

Now, to wit, on this — Monday of ——, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the plaintiff in error, by John B. Allen, its attorney, and says that in the records and proceedings aforesaid (the same being a cause lately pending in the supreme court of the State of Washington, wherein the said Bellingham Bay & British Columbia Railroad Company was appellant and the said City of New Whatcom was respondent, said cause in said court being numbered 2361) and in the giving of the judgment by the supreme court of the State of Washington in the cause aforesaid there is manifest error in this, to wit:

1st. That the supreme court of the State of Washington erred in sustaining the superior court of Whatcom county, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from the answer of the plaintiff in error to the complaint of the defendant in error the sixth separate answer thereof filed in said superior court of Whatcom county, Washington, which motion was sustained by the

143 sustaining of the validity of the statute of the State of Washington, to wit, section 4 of chapter XCV of the laws of said State enacted at a session of the legislature of said State held in the year 1893, which said section is found on page 228 of the said Session Laws for the Year 1893, the validity of which said statute was drawn in question by the said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that the said statute is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that it deprives plaintiff in error of its property without due process of law.

2nd. That the supreme court of the State of Washington erred in sustaining the superior court of Whatcom county, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from the answer of the plaintiff in error the sixth separate answer thereof to the complaint of the defendant in error filed in the superior court of Whatcom county,

Washington, which motion was sustained by the sustaining of the authority exercised by the defendant in error under the statute of the State of Washington, to wit, chapter XCV of the laws of said State — held in the year 1893, which said act is found in the Session Laws of said State for the Year 1893, at pages 226 to 231, inclusive, the validity of which authority so exercised by defendant in error under said chapter of said session laws was drawn in question by said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that said authority so exercised under said chapter of said act and the said chapter is each repugnant to section 1 of amendment 14 of the Constitution of the
144 United States, in that the said authority by defendant exercised under said chapter of said acts deprives the plaintiff in error of its property without due process of law.

3rd. That the supreme court of the State of Washington erred in sustaining the superior court of Whatcom county, State of Washington, in its findings, conclusions, and decree, both upon the facts and upon the law, in finding that due, legal, and sufficient notice to the plaintiff in error was given of the time and place of the meeting of the council of defendant in error mentioned in the tenth finding of fact made by the said superior court, which said findings conclusions, and decree were drawn in question by the sustaining of the validity of chapter XCV of the Session Laws of the State of Washington for the year 1893, found at pages 226 to 231, inclusive, of the laws of said State for the year 1893, and by the sustaining of the validity of the authority exercised by the defendant in error under said statute, the validity of which said statute and the validity of the authority exercised thereunder by the defendant in error was drawn in question by said findings, conclusions, and decree, for the reason that the said statute and the said authority exercised thereunder is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives the plaintiff in error of its property without due process of law.

4th. That the supreme court of the State of Washington erred in its finding, conclusion, and decree, upon the facts and upon the law, in finding that the notice of the filing of the assessment-roll given by the defendant in error was not in fact the only notice of the proceedings, and in holding that the ordinance providing for the reassessment was some notice of the proceedings and should have some bearing in determining the sufficiency of the notice given in considering the length of time allowed for filing
145 objections, which said finding, conclusion, and decree were drawn in question by the sustaining of the validity of chapter XCV of the Session Laws passed by the legislature of said State in the year 1893, and found in said Session Laws at pages 226 to 231, inclusive, and by the sustaining of the validity of the proceedings had and authority exercised under said act by the defendant in error, the validity of which act, proceedings, authority, and ordinance were drawn in question by the sixth separate answer of the plaintiff in error, and by the exceptions taken to such finding, con-

clusion, and decree, for the reason that said statute and the authority exercised thereunder is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

5th. That the supreme court of the State of Washington erred in sustaining the superior court of Whatcom county, Washington, in its order and ruling by which it sustained, both upon the facts and upon the law, the said superior court of Whatcom county, State of Washington, in finding, establishing, and decreeing valid the several liens in favor of the defendant in error and against the plaintiff in error set out in the decree of the said superior court, all of which was done by sustaining the validity of chapter XCV of the Session Laws of 1893, which said chapter is found in the said Session Laws of the State of Washington, at pages 226 to 231, inclusive, and by sustaining the validity of the authority exercised thereunder by the defendant in error, the validity of which said statute and the validity of which said authority so exercised thereunder was drawn in question by said order, rulings, findings of fact, conclusions of law, decree, and exceptions thereto, for
146 the reason that the same and each of the same is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

Whereas by the laws of the land said judgment and decree ought to have been given for the said plaintiff in error and in favor of the validity of the said authority exercised under the said section 1 of amendment 14 of the Constitution of the United States and against the validity of the said section 4 of chapter XCV of the laws of the State of Washington, and against the validity of the said chapter XCV of the said laws of the State of Washington, and against the validity of the authority exercised by the defendant in error under the said chapter XCV of the said laws of the State of Washington and in favor of the said plaintiff in error.

Therefore said plaintiff in error prays that the judgment and decree aforesaid, for the errors aforesaid and other errors in the record and proceedings first aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said plaintiff in error may be restored to all things which it has lost by occasion of the said judgment and decree.

JOHN B. ALLEN,
Attorney and of Counsel for Plaintiff in Error.

Indorsed: 2361. Bellingham Bay and British Columbia Railroad Company, plaintiff in error, *vs.* City of New Whatcom, defendant in error. Filed Mar. 25, 1897. C. S. Reinhart, clerk. John B. Allen, attorney for plaintiff in error.

147 In the Supreme Court, State of Washington.

BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, Plaintiff in Error,
v.
CITY OF NEW WHATCOM, Defendant in Error. } No. 2361.

STATE OF WASHINGTON, *County of Thurston,* } *ss*:

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above-entitled cause; that in pursuance of the writ of error heretofore filed in this case I now transmit said transcript, together with the original writ of error and the original citation, to the Supreme Court of the United States.

I further certify that I have incorporated herein a copy of the opinion in cause No. 2362, between The City of New Whatcom and The Bellingham Bay Improvement Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of March, A. D. 1897.

Seal of the Supreme Court, State of Washington.

C. S. REINHART, *Clerk.*

Endorsed on cover: Case No. 16,561. Washington supreme court. Term No., 355. The Bellingham Bay and British Columbia Railroad Company, plaintiff in error, *vs.* The City of New Whatcom. Filed April 17, 1897.

No. 96.

Brf. of Dudley, Michener & Allen for P. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Oct. 29, 1898.

No. 96.

THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW WHATCOM, DEFENDANT IN ERROR.

October Term 1897, No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

W. W. DUDLEY,
L. T. MICHENER,
JOHN B. ALLEN,
Attorneys for Plaintiff in Error.

Lowman & Hanford Stationery & Printing Co., Seattle.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 96.

THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF NEW WHATCOM, DEFENDANT IN ERROR.

OCTOBER TERM, 1897.

No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

In July, 1890, the former City of New Whatcom, Washington, ordered the improvement of Elk Street between Elk Street East and North Street (a distance of nine blocks in length). (*Printed record, 18, 45, 46, 56.*)

It let the contract therefor in August, 1890. (*Printed record, 18, 46, 56.*) This contract was completed and the improve-

ment accepted by the former city of New Whatcom. (*Printed record, 18, 46, 56.*)

In October, 1890, the former city of New Whatcom levied the first or former assessment upon the abutting property. (*Printed record, 18, 46, 56, and "warrant of collection" on back exhibit E, Printed record, 112.*)

January 7th, 1891, this assessment purported to become delinquent. (*Printed record, 35.*)

February 16, 1891, the present city of New Whatcom became the lawful successor of the former cities of Whatcom and New Whatcom. (*Printed record, 17, 34, 45.*)

September 1st, 1892, the present city of New Whatcom filed its amended complaint in the Superior Court of Whatcom County, State of Washington, in a suit therein pending, entitled City of New Whatcom, plaintiff, vs. E. F. G. Carlyon, J. E. Baker and Olive Baker, defendants. The object of this suit was to obtain a decree foreclosing the lien alleged to have been created by the former assessment, as against one lot in block one hundred and forty, and six lots in block one hundred and forty-three, the property of the defendants. (*Printed record, 33 to 36, and exhibit E.*)

The Superior Court, on January 13th, 1894, entered its findings, conclusions and decree annulling the assessment, in so far as the same appertained to the property of the defendants involved in that action. (*Printed record, 45, 47, 48.*)

The Supreme Court affirmed this decree February 14th, 1895. (*Printed record, 48.*)

Plaintiff in error was not a party to this suit, nor was any of its property involved therein. A description of its property

is contained in the findings of the trial court in the case at bar. (*Printed record, 19.*)

The re-assessment act was approved March 9th, 1893. (*Laws of Washington, Session of 1893, pages 226 to 231*). Section 1 of said act is as follows:

"Section 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, re-grading, paving, re-paving, planking, re-planking, side-walking and bridging, macadamizing, re-macadamizing, graveling, re-graveling, piling, re-piling, capping, re-capping, any street, avenue or alley, or for any local improvement, which has heretofore been made or which may hereafter be made by any city or town, has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this state, or for any cause whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement, to the extent of their proportionate part of the expense thereof, and in case the cost shall exceed the actual value of such local improvement the new assessment or re-assessment shall be for and based upon the actual value of the same at the time of its completion; and to this end the board of public works or other proper authority of such city or town shall make a new assessment roll in equitable manner with reference to the benefits received, as near as may be in accordance with the law in force at the time such re-assessment is made, and when the same shall have been confirmed and approved by the council it shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter or laws governing such city or town; but all proceedings relative to making the expense of local improvements charge-

able upon property benefited thereby, required and provided by the charter or laws of such city or town, prior to the making of original assessment roll, shall not be included nor required within the purpose of this act."

Plaintiff in error is a private corporation existing under the laws of the State of California, and authorized to transact business in the State of Washington. (*Printed record, 17.*)

Defendant in error is a city of the third class (*Printed record, 17*) and its ordinances do not take effect until five days after their publication. (*1 Ballinger's Codes and Statutes of Washington, Sec. 936.*)

Ordinance No. 301 was passed March 18th, 1895, and approved March 19th, 1895. (*Printed record, 18.*) From the printed record, page 55, it might be inferred that this ordinance was not published until February 12th, 1896. We believe this to be an error, as we understand it was published March 20th or 22d, 1895.

This ordinance in no manner relates or purports to relate to the improvement in controversy. It is merely a general ordinance for the purpose of supplementing the re-assessment act, and prescribing the procedure to be followed in the event of a re-assessment of any street becoming necessary.

Ordinance 306 was passed June 10th, 1895, approved June 11th, 1895, and published June 18th, 1895. (*Printed record, 18, 57.*)

This is the ordinance ordering the re-assessment in controversy. There is, however, nothing in this ordinance, provisionally or otherwise, making any *levy* against the property to be assessed, and there is therein no time or place designated when or where objections can be filed or heard.

After ordering the re-assessment, the various steps leading up

to its levy were taken, as recited in ordinance 310, (*printed record 58-59*), between June 18th, 1895, and July 22d, 1895, at which last named date the re-assessment was levied. (*Finding 10, printed record, 19, also 58-59.*)

Notice of the time and place objections to the proposed re-assessment might be filed was published in a daily newspaper in its issues of July 9th, 10th and 11th, 1895, respectively, and are set forth in said Ordinance No. 310, as follows:

"Whereas, said city council did on the 8th day of July, 1895, order said assessment-roll filed in the office of the city clerk, and fixed Monday, July 22d, 1895, at 7:30 p. m. as a time at which they would hear, consider and determine any and all objections to the regularity of the proceedings in making such assessment, or to the amount to be assessed upon any block, lot or tract of land for said improvement, and

Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to-wit: in the Daily Reveille, in three consecutive issues thereof, the same being the issues of July 9th, 10th and 11th, 1895;" (*Printed record, 11, 58-59.*)

Under the act, all objections must be filed within ten days from the last publication of the notice or they will be barred. Only those filing objections can appeal from the decision of the council. As to all others, its decision conclusively establishes the regularity, validity and correctness of the re-assessment. (*Laws, 1893, pages 228 to 230, Secs. 4 to 5 and 8.*) These sections are as follows:

"Sec. 4. Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the

parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

"Sec. 5. At the time appointed for hearing objections to such assessment the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such re assessment and to the correctness of the amount of such re-assessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm or set aside, and to order that such assessment be made *de novo*, and such council shall pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said re-assessment, to the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses the hearing shall be had before a joint session, but the ordinance approving and confirming the reassessment shall be passed in the same manner as other ordinances."

"Sec. 8. Any person who has filed objection to such new assessment or re-assessment, as hereinbefore provided, shall have the right to appeal to the superior court of this state and county in which such city or town may be situated."

September 23, 1895, the re-assessment purported to become delinquent (*Printed record, 19*), and on April 14th, 1896, suit was instituted in the Superior Court of Whatcom County, State of Washington, by defendant in error against plaintiff in error, to foreclose the liens alleged to have been created by the reassessment, aggregating, against the property of the plaintiff in error, the sum of $221.00. (*Printed record, 1 to 5, inclusive.*)

Plaintiff in error appeared and filed seven separate answers to the complaint. The sixth separate answer set up the form of the notice given of the time and place objections could be filed and heard. This answer also avers that neither the plaintiff in error nor any of its officers were ever in any manner given any notice of the proceedings set out in the complaint of the defendant in error; and that the only notice ever given was a constructive notice published in three consecutive issues of a daily newspaper printed in the City of New Whatcom. By reason of the premises, it is in such answer specially set up that the proceedings had by the defendant in error and set up in its complaint are in violation of the rights secured to the plaintiff in error under the fourteenth amendment to the Constitution of the United States. (*Printed record, 11, 12 and 13.*)

Defendant in error's motion to strike, as no defense to its suit, the fourth, fifth and sixth separate answers was by the trial court sustained; to which ruling plaintiff in error excepted. (*Printed record, 14, 15 and 16.*) Thereupon a trial was was had of the issues raised by the first, second, third and seventh separate answers, and the trial court made its findings of fact, conclusions of law and entered its decree in favor of defendant in error. (*Printed record, 17 to 20, and 22-23.*)

Plaintiff in error then appealed to the Supreme Court of the State of Washington, it being the court of last resort in said state. In said court the plaintiff in error urged that the trial court erred in not sustaining the contention of plaintiff in error that the proceeding had by the defendant in error, as set out in its complaint, was in violation of section 1 of amendment 14 of the Constitution of the United States. This contention was also overruled by the Supreme Court of the State of Washington, (*Printed record, 61, 62, 63, 64, 77*), and thereupon

the plaintiff in error sued out its writ of error to this court, and filed therein its assignment of errors. (*Printed record, 69 to 76, inclusive.*)

Plaintiff in error bases its rights upon the following

ASSIGNMENT OF ERRORS.

First—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from the answer of the plaintiff in error to the complaint of the defendant in error the sixth separate answer thereof filed in said Superior Court of Whatcom County, Washington, which motion was sustained by the sustaining of the validity of the statute of the State of Washington, to-wit, section 4 of Chapter XCV of the laws of said state, enacted at a session of the legislature of said state held in the year 1893, which said section is found on page 228 of the said session laws for the year 1893, the validity of which said statute was drawn in question by the said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that said statute is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law.

Second—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from

the answer of the plaintiff in error the sixth separate answer to the complaint of the defendant in error filed in the Superior Court of Whatcom County, Washington, which motion was sustained by the sustaining of the authority exercised by the defendant in error under the statute of the State of Washington, to-wit: Chapter XCV of the laws of said state enacted at a session of the legislature of said state held in the year 1893, which said act is found in the session laws of said state for the year 1893, at pages 226 to 231, inclusive, the validity of which authority so exercised by defendant in error under said chapter of said session laws was drawn in question by said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that said authority so exercised under said chapter of said acts and said chapter is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the said authority by the defendant exercised under said chapter of said acts deprives the plaintiff in error of its property without due process of law.

Third—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its findings, conclusions and decree, both upon the facts and upon the law, in finding that due, legal and sufficient notice to the plaintiff in error was given of the time and place of the meeting of the Council of defendant in error mentioned in the tenth finding of fact made by the said Superior Court, which said findings, conclusions, and decree were drawn in question by the sustaining of the validity of Chapter XCV of the Session Laws of the State of Washington for the year 1893, found at pages 226 to 231, inclusive, of the laws of said state for the year 1893, and by the sustaining of the validity of the authority exercised by the defendant in

error under said statute, the validity of which statute and the validity of the authority exercised thereunder by the defendant in error were drawn in question by said findings, conclusions, and decree, for the reason that said statute and the said authority exercised thereunder is each repugnant to section 1 of the 14th amendment of the Constitution of the United States, in that the same and each of the same deprives the plaintiff in error of its property without due process of law.

Fourth—That the Supreme Court of the State of Washington erred in its finding, conclusion, and decree, upon the facts and upon the law, in finding that the notice of the filing of the assessment roll given by the defendant in error was not in fact the only notice of the proceedings, and in holding that the ordinance providing for the re-assessment was some notice of the proceedings and should have some bearing in determining the sufficiency of the notice given in considering the length of time allowed for filing objections, which said finding, conclusion, and decree were drawn in question by the sustaining of the validity of Chapter XCV of the session laws passed by the legislature of said state in the year 1893, and found in said session laws at pages 226 to 231, inclusive, and by the sustaining of the validity of the proceedings had and the authority exercised under said act by the defendant in error, the validity of which act, proceedings, authority and ordinance was drawn in question by the sixth separate answer of the plaintiff in error, and by the exceptions taken to such finding, conclusion, and decree, for the reason that said statute and the authority exercised thereunder is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

Fifth—That the Supreme Court of the State of Washington

erred in sustaining the Superior Court of Whatcom County, Washington, in its order and ruling by which it sustained, both upon the facts and upon the law, the said Superior Court of Whatcom County, State of Washington, in finding, establishing and decreeing valid the several liens in favor of the defendant in error and against the plaintiff in error set out in the decree of the said superior court, all of which was done by sustaining the validity of Chapter XCV of the Session Laws of 1893, which said chapter is found in said Session Laws of the State of Washington, at pages 226 to 231, inclusive, and by sustaining the validity of the authority exercised thereunder by the defendant in error, the validity of which said statute and the validity of which said authority so exercised thereunder was drawn in question by said order, rulings, findings of fact, conclusions of law and decree, and exceptions thereto, for the reason that the same and each of the same is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

ARGUMENT.

Plaintiff in error, having in its sixth separate answer expressly invoked the protection of the fourteenth amendment of the Constitution of the United States, a federal question is properly presented and the jurisdiction of this court is unquestioned.

Chicago, B. & Q. R. Co. vs. City of Chicago, 17 Sup. Ct. Rep., 581.

Backus vs. Fort St. Union Depot Co., 18 Sup. Ct. Rep., 445, 448.

Plaintiff in error did not lose its right to urge the error of the trial court in sustaining the motion to strike its sixth separate answer by going to trial upon its general denial.

Scott vs. Hallock, 16 Wash., 439.

It appears from the record in this cause that the improvement in question was constructed, and the abutting property originally assessed, in the years 1890. No proceedings were ever instituted to collect the original assessment against any of the property of the plaintiff in error, and it was never made a party to any suit to collect any portion of the original assessment.

In 1892, one Carlyon, Baker and wife were made parties to a suit to collect the original assessment, as against certain lots owned by them. In 1895, the Supreme Court affirmed the judgment of the trial court, holding the original assessment as to the property of Carlyon, Baker and wife, void. Under the re-assessment act (*Laws 1893, page 226*) a re-assessment could be had whenever an assessment had been either directly or indirectly set aside by any court of competent jurisdiction.

As a result of the Carlyon-Baker suit, the city proceeded to re-assess all of the property included in the former assessment district. This re-assessment was initiated by the passage of ordinance No. 306, in June, 1895, being a period of five or six years after the completion of the improvement and the levying of the former assessment.

The only notice ever given of the re-assessment was by a publication for three successive issues in a daily newspaper of a notice, the form of which is set out in the sixth separate answer above referred to.

The main contention in this cause is, that owing to the nature of the re-assessment proceeding, the form of the notice,

and the period of its publication, the time allowed in which to appear under the notice is too unreasonable to constitute due process of law within the meaning of section 1 of the 14th amendment to the Constitution of the United States.

Before presenting authorities upon this point, we desire to advert to certain language contained in the opinion of the Supreme Court in its decision in this case. At page 62 of the printed record, the Supreme Court says:

"It appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed."

We are at a loss to account for this language, for the reason that there is no finding contained in the record, nor any evidence upon which such finding could be made, supporting the assertion that appellant (plaintiff in error) has been contesting the proceedings to collect the cost of these improvements for several years past. If such finding had been made, we are aware that this court would not review the evidence for the purpose of ascertaining its correctness. In the absence, however, of any testimony or finding, we think the expression of the court, last referred to, falls within the rule announced by this court in the case of *Stone vs. United States, 164 U. S. 380, 383.* In that case the court uses this language:

"We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

The same is also true of the language used in the opinion to the effect that no hardship has resulted in consequence of the shortness of time prescribed. If it be true, as alleged in the fourth separate answer, that the property in controversy is not assessed on the basis of the benefits received; and if it be further

true that plaintiff in error is estopped from offering proof as to these matters in the foreclosure proceedings by reason of not having presented the same to the Council, serious hardship has resulted by reason of the shortness of the time allowed in which to file objections before the Council.

The tenth finding of fact made by the trial court (*Printed record, 19*) finds that the Council acted upon the re-assessment roll "after due and legal notice of the time and place of such meeting."

From Ordinance No. 310 (*Printed record, 58-59*) it appears that the official paper of the city of New Whatcom, in which the notice in question was published, was a daily newspaper, and that the publication of the notice was contained in the issues of such paper published July 9th, 10th and 11th, in the year 1895. The form of the notice is not contained in any portion of the record by the trial court allowed to stand, but is set forth in the said sixth separate answer which was stricken out on motion by the trial court. This recital is in the nature of an admission binding upon the city.

State ex rel. vs. Gloyd (*Wash.*), *44 Pac. Rep., 103-104.*

It is not claimed that there is any evidence of a different notice of the hearing being given, or of the same being published for a greater length of time than as set forth in said sixth separate answer of plaintiff in error.

The motion to strike, as no defense to the suit, the sixth separate answer, in legal effect, admits the notice therein pleaded to be the only notice ever given of any of the matters pleaded in the complaint. All the evidence and record, before both the trial and supreme courts, is contained in the printed record in the case at bar. (*Printed record, 28, 60, 77.*)

The tenth finding on this subject, to which plaintiff in error excepted (*Printed record, 20, 21*), must therefore be considered in the nature of a legal conclusion on the part of the trial court, that the notice given and published as stated, was sufficient to meet the requirements of due process of law, and was the only notice, unless it be such notice, if any, as was imparted by the ordinances.

We shall first consider the sufficiency of the notice given irrespective of the ordinance referred to in the opinion of the supreme court.

NOTICE.

It is too well settled to require a lengthy citation of authorities, that in local assessment proceedings of the character in question, notice to the person whose property may be affected by the local assessment, and an opportunity to appear and contest the legality, justness and correctness of the assessment at some stage of the proceedings before it becomes final, are necessary to constitute due process of law.

Stuart vs. Palmer, 74 N. Y., 183.
Violett vs. City Council of Alexandria (Va.), 31 L. R. A., 382, and cases cited.

It is also well settled that in such local assessment proceedings, the same being an exercise of the taxing power, and not of the power of eminent domain, constructive notice by publication is sufficient to constitute due process of law.

Lent vs. Tillson, 11 (U. S.) Sup. Ct. R., 825-30-31.
Paulson vs. City of Portland, 13 (U. S.) Sup. Ct. R., 750-2.

The re-assessment act in question provides for two notices to the property owner; first, the notice of filing with the city clerk of the assessment roll, as contained in section 4 of the act. Second, by the provisions of an act found on page 161 of the acts of 1893, liens for street assessments are to be foreclosed according to the code of civil procedure, which, of course, necessitates notice in the court before foreclosure proceedings can be had.

The re-assessment act undertakes to make the hearing had before the council, pursuant to the notice provided in section 4, in the absence of an appeal, a final determination of the regularity, validity and correctness of the re-assessment to the amount thereof levied on each lot or parcel of land.

Section 8 limits the right of appeal to the superior court for the purpose of reviewing the action of the council to those persons who have filed objections before the council in the manner prescribed in said section 4.

The supreme court has sustained this construction of the statute.

Northwestern, etc., Bank vs. Spokane, 18 Wash. 456.

Section 4 of this act (*supra*) provides that the town or city clerk shall give notice by three successive publications in the official newspaper of the town or city stating therein that the assessment roll is on file in his office, and that at the time named the council will hear and consider objections to such roll by the parties aggrieved by the assessment. The owner of property is by statute given ten days after the last day of publication within which to file his objections in writing to the assessment. The record shows the official newspaper was a daily paper, and the publication of notice was made for three successive days. We submit that a notice that is final

and conclusive upon the property owner as to all questions save the jurisdiction of the tribunal to make the assessment is so short and so barely constructive as not to be a notice at all. While we concede in the first instance to the legislature the authority to prescribe the time of the notice, we assert that this is not an absolute authority relieved from judicial review. The shortening of the time and the limiting of opportunity to be informed through constructive notice may be such as to render the notice unavailing for the purpose for which notice is designed. If that be the case it is not notice. To prescribe that within ten days after the contingency of a three days' publication the landowner is left without redress for any kind of burden that may be placed upon his property in the way of taxation amounts to a taking of property without due process of law. Under the pretence of prescribing and regulating notice, all practical notice cannot be taken away. There is a limit to legislative power in shortening the time of notice, and if that limit is transcended the courts will hold it void.

As stated by Mr. Justice Miller in the case of *Davidson vs. New Orleans, 96 U. S., at page 104*, courts have uniformly refused to define the term due process of law, but have committed the "ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual proeess of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Again, in the concurring opinion in the same case, delivered by Mr. Justice Bradley, he uses the following language:

"The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. I think, therefore, we are entitled, under the fourteenth amendment, not only to

see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The language of Justice Bradley, above quoted, has frequently been cited with approval by this court.

In *Railroad Commission Cases, 116 U. S. 307*, at page 331, this court said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

While in *St. Louis & San Fran. Ry. Co. vs. Gill, 156 U. S. 649*, the court states the law as follows:

"This court has declared in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their prop-

erty without due process of law, and as depriving them of the equal protection of the laws." Pages 657, 658.

Hager vs. Reclamation District (*U. S.*), *4 Sup. Ct. R., 667.*
Lent vs. Tillson, 11 (*U. S.*) *Sup. Ct. R., 830.*
Regan vs. Farmers' Loan & Trust Company, 154 U. S., 362.
Smyth vs. Ames, 18 Sup. Ct. R., pp. 418, 424.

Section 4 of the re-assessment act provides as follows:

"Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment."

As we have seen from the record in this case, the only notice given was notice published for three consecutive days, in a daily newspaper; and within ten days from the date of the last publication all objections must be on file.

Since the notice provided for by the re assessment act, as construed by the Supreme Court of this state, is held to be sufficient to confer jurisdiction, then a lot owner, whether he has knowledge of such notice or meeting or not, is absolutely precluded from thereafter contesting the regularity, validity and correctness of the re-assessment, such right being alone accorded to those who have appeared, filed objections and appealed.

We respectfully submit that under the peculiar facts sur-

rounding re-assessment proceedings, such notice is not suitable or admissible in such cases, and that the same is arbitrary, oppressive and unjust, and should be declared not to constitute due process of law.

Under the act in question a lot owner may have paid his prior assessment. The former assessment may possibly be declared void in a proceeding to which neither he nor his property is a party, and of which he is in no way chargeable with notice. There are no overt acts of improvement, possession or otherwise, such as attended the original improvement of the street, to place him upon his inquiry, or charge him with notice. Resting in the security afforded him by the payment already made, and in the belief in the validity of the prior assessment, evidenced by such payment, he is in no manner guilty of neglect or other laches in failing to expect a re-assessment, or to be on the watch for the same. The validity of the act depends not upon the fact that the owner may by chance have notice, or that he may as a matter of favor have a hearing. The law must require sufficient notice and give him a fair opportunity to be heard. The act is to be tested, not by what has been, but by what may be done under it.

Stuart vs. Palmer, 74 N. Y., 183.

As before indicated, a failure to file objections at the hearing before the council, where the notice has been given, as required by the act, operates in the nature of a limitation upon the right of a lot owner to thereafter contest either the regularity, validity or correctness of the re-assessment proceedings.

An instructive case upon this point is that of *Hayes vs. Douglas County (Wis.), 65 N. W. Rep. 486 (31 L. R. A., page 213)*, decided December, 1895, wherein it was held that a stat-

ute making the issue of improvement bonds conclusive of the validity of an assessment, and permitting the issue of bonds without actual notice to the owners of the property assessed, or upon published notice only, within forty days after the assessment is finally determined, is unconstitutional, as providing for deprivation of property without due process of law.

The following language is used on page 486:

"The contract may be let after publication of notice for bids for one week. After the contract has been let, the improvement bonds may be issued after thirty days notice by publication in a newspaper. No actual notice is provided for, and the bonds may be issued before the work is commenced. So that, if the statute is sustained as a valid limitation, its bar may be complete within forty days after the assessment is finally determined, and regardless of the fact whether the owner has acquired actual knowledge of the proceedings against his property. These are proceedings whereby property is to be taken *in invitum*. No man's property can be lawfully taken or taxed but by due and regular process of law; nor forfeited except by his own omission seasonably to assert his right. * * * All statutes of limitation proceed upon the theory that the party has forfeited his right to assert his title, in the law, by lapse of time and omission to assert it. This necessarily presupposes that a full and fair opportunity has been afforded him to try his right in the courts; for it cannot justly be considered that he is in default and laches until such just opportunity has been afforded him, and he has failed to avail himself of it. Any attempt to cut off his right without having afforded him such just and reasonable opportunity is not properly a statute of limitations at all. It savors rather of spoliation and plunder. Cooley, Const. Lim., 6th Ed., 449. No doubt under a statute which provides for actual notice to the owner, a shorter limitation could be held reasonable than where constructive notice only is provided. Under this statute, many an owner may, without fault, be without actual knowledge of the pendency of

proceedings against his property, until the bar of this statute has foreclosed his right; and this may all well happen before any work, such as might arrest the attention of resident owners, is actually commenced under the contract. It is not questioned that all the proceedings relating to the assessment may be supported on notice by publication only; but *the fact that the notice provided for is constructive only is an element proper to be considered in determining whether the time limited affords reasonable opportunity for the owner to assert his right. No doubt such time should be allowed as would give a reasonable chance to acquire actual knowledge of the pendency of proceedings against his property, and to ascertain and assert his rights.* No absolute rule can be laid down as to what length of time will be deemed reasonable for the government of all cases alike. Different circumstances require different rules. What would be reasonable in one class of cases would be entirely unreasonable in another. *Wheeler vs. Jackson, 137 U. S. 245-255, 34 L. ed. 659-663.* While it is no doubt convenient and desirable, on the part of the municipality, that all questions in respect of the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. *The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred.* It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property."

We respectfully submit that under proceedings of the character in question, which, as before suggested, may in many instances be had against property owners who have already paid their prior assessments, who were not parties, either in person or in property, to the action in which the prior assess-

ment was declared void, to absolutely cut off their right to contest either the validity, regularity or correctness of the re-assessment proceedings upon a publication in three successive issues of a daily newspaper, is, in the language of this court, "arbitrary, oppressive and unjust," and furnishes no reasonable opportunity to acquire knowledge of the pendency of such proceedings, or to assert before the council their rights therein.

We know of no notice by publication in any analogous proceedings under the statutes of this state where the period of publication is so short, and the opportunity to appear and be heard so brief, as in the notice provided in the re assessment act under consideration.

Even in the general revenue law, where a time certain is fixed by the act at which the county treasurer will apply to the superior court for judgment on the delinquent tax rolls, notice by publication is required to be given once each week for three successive publications, the last of which shall be at least one week prior to the date fixed in such advertisement of such intended application.

Laws of 1895, pages 521-2, secs. 23-4.

In the revenue law, the time at which the application for judgment will be made to the court being fixed by the statute, it is unnecessary to give any notice thereof to constitute due process of law.

Kentucky Tax Cases, 115 U. S., 335-6; (s. c.) 6 Sup. Ct. R., 57.

Pittsburg C. C. & St. L. Ry. Co. vs. Bacus, (U. S.) 14 Sup. Ct. Rep. 1114.

Notwithstanding this fact, however, the legislature has provided for the notice above referred to.

It may be urged that if the provisions of section 4 of the re-assessment act are insufficient to constitute due process of law, that the notice served upon the property owners in the foreclosure proceedings is sufficient to constitute due process of law.

Before this contention can be supported, the defendant in such foreclosure proceeding must have an opportunity of contesting the charge thus imposed and presenting any defense going either to the regularity, validity or correctness of the assessment, and the amount thereof.

Hager vs. Reclamation District, (U. S.) 4 Sup. Ct. R., at pages 668-9, and cases cited.

We have already presented our views relative to the sufficiency of the notice, in so far as the time and manner of its publication are concerned. We have seen that the same is unreasonably short, and in that respect fails to meet the requirements of due process of law.

Should this contention be not sustained, we respectfully submit that the circumstances attending the publication of this notice make it imperative that its form should be of such a character as to readily apprise property owners of the nature of the pending proceedings. The notice fails to describe any property to be assessed, and is addressed to no property owner by name. It is headed "Special levy of the expense of local improvement district No. 4 'A' on Dock Street from Holly to Willow street." This is the first time any such pretended description is called to the notice of a property owner. It has never theretofore appeared in any of the proceedings connected with the improvement of the street, or in any petition or other record connected with the improvement or assessment of the street, save and excepting in the ordinance providing for the

re-assessment, which ordinance in this case was published but once, on February 11th, 1896. (*Printed record, 64.*)

On the sufficiency of the form of such notices in general, see the following authorities:

State vs. City of Elizabeth, 37 N. J. L., 335, 356-7.
State vs. Mayor and Council of Newark, 31 N. J. L. 360-64.
Keen vs. Asch, 27 N. J. Eq., 57.
Gatch vs. Des Moines, 63 Ia. 718, (s. c.); 18 N. W., 310-12-13.
White vs. Smith, 68 Ia. 718, (s. c.); 25 N. W. 115.
Trustees vs. Davenport, 65 Ia. 633, (s. c.); 22 N. W. 904.
24 Central Law Journal, 592, secs. 9 and 12.
Wade on Notice, 2d Ed., secs. 1109-1110 and cases cited.
Burg vs. C. M. & St. P. Ry. Co. 65 Ia. 404, (s. c.); 21 N. W. 767.

We desire to here notice some of the principal cases relied upon by the defendant in error in the Supreme Court of this state.

The case of Paulson vs. City of Portland, 13 Sup. Ct. Rep., is not in point, it being expressly stated, at page 753 of the opinion, that neither the form of the notice nor the time of its publication was disclosed by the record.

The case of Gilmore vs. Henting (Kan.), 5 Pac. Rep. 792, was much relied upon by the defendant in error. We desire, briefly, to distinguish that case from the one at bar. In that case, by ordinance published September 8, 1883, a special levy was provisionally made; a notice of the hearing of complaints by the council on the evening of September 24, 1883, was published September 22d, and 24th, respectively, and an ordinance making a final levy was published October 16, 1883. *The tax could not become a fixed and established charge or lien upon the property taxed prior to November 1, 1883.*

Under the express terms of that decision property owners for a period of fully *thirty-seven* days after the meeting of the council of September 24, and after the action of said council at such meeting, could apply to the council to make corrections or changes in their taxes, or commence an action to enjoin all further proceedings, or for some other sufficient and adequate relief. *No particular form or manner of giving notice was required under the law and facts of that case,* and the court only held the combined notice in the two ordinances (in each of which an assessment was levied), and the published notice, *probably sufficient.*

In that case the tax became a fixed and established charge or lien upon the property on November 1, 1883, but notwithstanding that fact, the tax was set aside in an action instituted *March 11, 1884,* for the reason that no detailed estimate, under oath, had been filed by the city engineer, and because the one filed was in excess of the estimated cash cost of the work.

In the case at bar, ordinance 320 made no levy whatever, and no intimation is therein given what amount will be assessed against any particular description of property, or when, if ever, the council will meet to hear objections to the same.

When the council does meet (under the present holding of the Supreme Court of this State), its decision is to be a final determination of the regularity, validity and correctness of the re-assessment, to the amount thereof, levied on each lot or parcel of land. The tax becomes a fixed and established charge. No opportunity is thereafter afforded, as in the case of Gilmore vs. Hentig, *supra,* of contesting either the regularity, validity or correctness of the same.

From the doubtful sanction given by the court to the sufficiency of the notice in Gilmore vs. Henting, we are confident

had the facts in that case been similar to those in the case at bar, a different holding would have followed.

It is not necessary, in order to set aside the proceedings in question, to hold the re-assessment act invalid in its provisions relating to notice. A proper construction of section four would authorize a selection by the council of an official paper, having periods of publication sufficiently far apart to furnish a just and fair opportunity for the notices printed therein being seen, and allowing interested parties, both residents and non-residents, an opportunity of appearing and being heard.

This construction would result in sustaining the validity of the act, but in setting aside the authority exercised thereunder by the defendant in error; the authority so exercised, as well as the validity of the act, being brought into question by the assignment of errors heretofore made.

"Due process of law" does not mean mere legislative enactments nor simple compliance with the forms of law; such a construction would render the restriction nugatory, and turn this part of the constitution into mere nonsense.

Scott vs. Toledo, 1 L. R. A. 688, 694.

ORDINANCES.

From the *Printed record* (*page 55*) it would appear that Ordinance No. 301 was published on the 12th day of February, 1896. We believe this to be an error, as we understand this ordinance to have been published March 22d, 1895, although there is nothing in the record to that effect. This is, however,

immaterial, as this ordinance in no manner relates to the improvement in controversy, it being merely a general ordinance for the purpose of supplementing the re-assessment act in the method of procedure to be followed.

Ordinance No. 310 (*Printed record, 58*) can in no manner support the notice given, for the reason that this ordinance was introduced and passed after the notice was given, and after the hearing was had,—it being an ordinance approving and confirming the validity of the assessment which was fully established and determined prior to the passage of that ordinance.

Ordinance No. 306 (*Printed record, 56*) is the only ordinance that can possibly be construed in support of the notice.

If, however, the notice given is insufficient to constitute due process of law, it cannot be aided by this ordinance, for the following, among other reasons: (1) There is nothing in such ordinance, provisionally or otherwise, making any levy against property to be taxed, and the ordinance was published but once. (2) There is therein no time designated when such levy will be made, or a time or place specified when or where objections can be filed or heard. (3) Under the act a different manner of giving notice is expressly provided for. (4) Ordinances of a municipality are not binding upon non-resident property owners who remain without the limits of such city.

Dillon on Municipal Corporations, 4th ed., section 308, was relied upon to the effect that ordinances within the municipality have the force of laws. By an examination of the note to the above section, and also of sections 354 to 356, inclusive, it will be seen that the ordinances referred to appertain to the *police* power of the municipality, and not to property matters of the character in question, and that in no event are stran-

gers, who remain without the city, chargeable with notice of such ordinances.

If the notice is insufficient unaided by the ordinance, and the ordinance is inapplicable as to non-inhabitants, then the whole assessment must fall, as the legislature could not have been presumed to have provided for the collection of street assessments only against resident owners.

Stiles vs. Skagit County, 10 Wash., 388.

Under the repeated holdings of the Supreme Court of this state, the city, in the matter of collecting street grade assessments, acts as the trustee for the benefit of the warrant holders, and any losses arising by reason of the failure to collect must fall upon the warrant holders, and not upon the city.

Wilson vs. City of Aberdeen (Wash.), 52 Pac. Rep., 524.
German-American Savings Bank vs. City of Spokane, 17 Wash., 315.

This being true, it is a serious question if the whole procedure for a hearing before the council, and appeal to the superior court, provided for in the re-assessment act, should be held not to be a proceeding *in rem*, but should be construed to be a proceeding adverse to the interest of the property owner.

At the time the property owner is required to appear and file objections, no levy has been created against his property or lien established thereon, nor is any possession thereof taken. On the contrary, he is required to appear and show cause why a lien should not be established against his property.

If this construction be maintained, then the notice provided for by the re-assessment act, and the notice actually given thereunder, are each insufficient to obtain jurisdiction of either the person or the property of the property owner, and the same

is therefore insufficient to meet the requirements of due process of law.

State vs. Guilbert, (O.) 47 N. E. Rep., 551-556-557.

Plaintiff in error contends that it is entitled to a reversal and respectfully asks for a decision reversing the decrees of the lower courts, and dismissing the suit originally brought by the defendant in error.

Respectfully submitted,

W. W. DUDLEY,
L. F. MICHENER,
JOHN B. ALLEN,
Attorneys for Plaintiff in Error.

BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY *v.* NEW WHATCOM.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 96. Argued December 16, 1898. — Decided January 3, 1899.

An answer by the defendant in an action in a state court brought to enforce a lien created by a reassessment of taxes upon its real estate, which sets up that the notice of the reassessment was insufficient, and that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the Fourteenth Amendment to the Constitution, raises a Federal question of which this court has jurisdiction.

When a notice is duly given to landowners by municipal authorities in full accordance with the provisions of the statutes of the State touching the time and place for determining the amounts assessed upon their lands for the cost of street improvements, such notice, so authorized by the legislature, will not be set aside as ineffectual on account of the shortness of the time unless the case is a clear one.

In view of the character of the improvements in this case, of the residence of the plaintiff in error, of the almost certainty that it must have known of the improvements, and of the action of the Supreme Court of the State, ruling that the notice was sufficient, it is held by this court to have been sufficient.

Before proceedings for the collection of taxes, sanctioned by the Supreme Court of a State, are stricken down in this court, it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded.

Prior to February 16, 1891, there were in the State of Washington two cities known as Whatcom and New Whatcom. On that date they were consolidated in conformity

with the general laws of the State, the consolidated city taking the title of the "City of New Whatcom." In July, 1890, and prior to the consolidation, New Whatcom ordered the improvement of Elk street, between Elk street east and North street. The contract therefor was let in August, 1890. The contract was completed and the improvement accepted by the city, and in October, 1890, an assessment was levied upon the abutting property. After the consolidation the present city of New Whatcom commenced several suits in the superior court of Whatcom County against various defendants owning lots abutting on the improvement, and sought to obtain decrees foreclosing the liens created by the assessment. On January 13, 1894, the superior court entered decrees annulling the assessment, and these decrees were affirmed by the Supreme Court of the State on February 14, 1895. The ground of the decision was, as stated by the trial court in its conclusions of law, "that said assessments were not made or apportioned in accordance with the benefits received by the property, but were made upon an arbitrary rule, irrespective of the benefits." On March 9, 1893, the legislature passed a general act providing for the reassessment of the cost of local improvements in case the original assessment shall have been or may be directly or indirectly set aside, annulled or declared void by any court. Laws Wash. 1893, p. 226.

Sections 4, 5 and 8 bear upon the matter of notice, and are as follows:

"SEC. 4. Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

Statement of the Case.

"SEC. 5. At the time appointed for hearing objections to such assessment the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such reassessment and to the correctness of the amount of such reassessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm or set aside, and to order that such assessment be made *de novo*, and such council shall pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said reassessment, to the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses the hearing shall be had before a joint session, but the ordinance approving and confirming the reassessment shall be passed in the same manner as other ordinances."

"SEC. 8. Any person who has filed objections to such new assessment or reassessment, as hereinbefore provided, shall have the right to appeal to the superior court of this State and county in which such city or town may be situated."

On March 18, 1895, the city council passed an ordinance prescribing the mode of procedure for collecting the cost of a local reassessment upon the property benefited thereby. On June 10, 1895, it ordered a new assessment upon the blocks, lots and parcels of land benefited by the improvement on Elk street, hereinbefore described, and directed the various officers of the city to take the steps required by the general ordinance of March 18. These steps were all taken in conformity to such ordinance, and on August 7, 1895, a further ordinance was passed reciting what had been done, approving it and confirming the reassessment.

The recital in that ordinance in respect to notice was as follows:

"Whereas, said city council did on the 8th day of July, 1895, order said assessment roll filed in the office of the city

clerk, and fixed Monday, July 22, 1895, at 7.30 P.M., as a time at which they would hear, consider and determine any and all objections to the regularity of the proceedings in making such assessments, or to the amount to be assessed upon any block, lot or tract of land for said improvements; and

"Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to wit: in the Daily Reveille, in three consecutive issues thereof, the same being the issues of July 9, 10 and 11, 1895."

The Bellingham Bay and British Columbia Railroad Company was a private corporation, organized under the laws of the State of California, but authorized to do business in the State of Washington, and having its principal office in the city of New Whatcom. It was the owner of certain property abutting upon the Elk street improvement, and which by the proceedings of the city council was held benefited by such improvement and charged with a portion of the cost. Failing to pay this charge, the city of New Whatcom instituted suit in the superior court of Whatcom County to foreclose the liens created by the reassessment. A decree was rendered in favor of the city, which, on appeal, was affirmed by the Supreme Court on December 8, 1896, 16 Wash. St. 131, whereupon this writ of error was sued out.

Mr. L. T. Michener for plaintiff in error. *Mr. W. W. Dudley* and *Mr. John B. Allen* were on his brief.

No appearance for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

By its answer the defendant raised a Federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law and in conflict with the terms of the Fourteenth Amendment to the Constitution. This court, therefore, has jurisdiction of the case.

That notice of the reassessment was essential is not questioned, *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; Cooley on Taxation, 266; and that constructive notice by publication may be sufficient is conceded, *Lent* v. *Tillson*, 140 U. S. 316, 328; *Paulsen* v. *Portland*, 149 U. S. 30; but the contention is that the notice, which was provided for, and which was in fact given, was insufficient, because it was only a ten days' notice. We quote from the brief of counsel:

"While we concede in the first instance to the legislature the authority to prescribe the time of the notice, we assert that this is not an absolute authority relieved from judicial review. The shortening of the time and the limiting of opportunity to be informed through constructive notice may be such as to render the notice unavailing for the purpose for which notice is designed. If that be the case it is not notice. To prescribe that within ten days after the contingency of a three days' publication the landowner is left without redress for any kind of burden that may be placed upon his property in the way of taxation amounts to a taking of property without due process of law. Under the pretence of prescribing and regulating notice, all practical notice cannot be taken away. There is a limit to legislative power in shortening the time of notice, and if that limit is transcended the courts will hold it void."

We are unable to concur in these views. It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed

and when and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections.' Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required? Indeed, we do not understand that any challenge is made of the sufficiency of the publication. But when that is made and is sufficient, notice is given. The fact that the owner after being notified is required to appear and file his objections within ten days, is thus the sole ground of complaint. But how many days can the courts fix as a minimum? How much time can be adjudged necessary as matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule. A reassessment implies not merely the fact of the improvement, but also that one attempt had been made to collect the cost and failed. Inquiry had been had in the courts, and the one assessment set aside. The facts were known. Ten days' time, therefore, does not seem unreasonably short for presenting objections to a reassessment.

And there is nothing in the case of this plaintiff in error to suggest any injustice. It, though a corporation of the State of California, was doing business in the State of Washington, and having its principal office in the city of Whatcom. In other words, it was domiciled in the city in which the improvement was made. The improvement made on the street, on which its lots abutted, consisted in grading, planking and sidewalking. It is, to say the least, highly improbable that it could have been ignorant of the fact that they were made. It must have known also that such improvements have to be paid for, and that the ordinary method of payment is by local

assessment on the property benefited — the abutting property being primarily the property benefited. A previous assessment had been made for the cost of these improvements. Litigation followed, which was carried to the Supreme Court of the State, and resulted adversely to the city. It is true this plaintiff in error was not a party of record in that litigation, and counsel criticise a statement in the opinion of the Supreme Court in this case, that "it appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed;" yet it may be that the court was advised by counsel that it had contributed to the cost of that litigation, and at any rate it is difficult to believe that it was ignorant all these years of what was going on.

In view, therefore, of the character of the improvements, the residence of the plaintiff in error, the almost certainty that it must have known of the improvements and that it would be expected to pay for them, it is impossible to hold that a ten days' notice was so short as to be absolutely void. And especially is this true when the Supreme Court of the State in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the Supreme Court of a State are stricken down in this court it must clearly appear that some one of the fundamental guarantees of right contained in the Federal Constitution has been invaded.

The judgment of the Supreme Court of the State of Washington is

Affirmed.